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A TREATISE  
ON THE  
LAW OF DAMAGES,

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW,

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF  
CONTRACT AND TORT.

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SECOND EDITION,

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# THE LAW OF DAMAGES.

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## PART II.

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### ITS APPLICATION TO VARIOUS CONTRACTS AND WRONGS.

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## SECTION 1.

## PENALTIES.

§ 470. **Bonds and penalties.** A bond is a form of obligation under seal, by which the party making it, the obligor, acknowledges himself bound to the other party, the obligee, in a specified sum. If accompanied by no other agreement or condition it evidences an absolute debt, and no question of penalty ordinarily arises. In that form it is called a single bond. When a condition of defeasance is added the sum stated in the bond is called a penalty; for it is usually much larger in amount than the value of the thing specified to be done in the condition which shows the real nature of the contract and contains its essence. There is no express agreement on the part of the obligor to perform such a condition; but he has thereby made the obligation subject to be discharged by performance of the act or acts which the condition specifies. Literally, the obligor, by the terms of the instrument, says he is absolutely obliged to pay the penalty unless he fulfills the condition. Such was formerly his legal obligation. [2] On failure to perform the condition the penalty became an absolute debt, and at law was recoverable. In equity, however, it was treated as security for performance of the condition, and relief was granted against the enforcement of the penalty on payment of a sum as damages, ascertained to be an equitable equivalent of the condition not performed; in other words, that court would not allow the obligee to take more than in conscience he ought.<sup>1</sup>

<sup>1</sup> Black. Com., Book II, p. 241; Hale v. Thomas, 1 Vern. 509; Bishop v. Church, 2 Ves. 371; Hobson v. Trevor, 2 P. Wms. 191; id. 243; Collins v. Collins, 2 Burr. 820; Chilliner v. Chilliner, 2 Ves. 528. See Bonafous v. Rybot, 3 Burr. 1370. Cannel v. Buckle,



§ 471. **Penalties in affirmative agreements.** Penalties are also often stipulated to be paid in agreements and covenants, in the event of the breach of affirmative stipulations. In such cases the party injured is not confined to his action for the penalty, but has an election to sue on the agreement or covenant. In that action he is entitled to recover full damages without regard to the penalty. It is not the measure of damages, nor does it limit the recovery thereof, if the actual injury requires a larger amount for just compensation.<sup>1</sup> He may sue for the penalty, and when he does so the recovery is governed substantially by the same principles as when the action is upon a bond. By the early common law, in either case, if by the terms of the condition of defeasance, or the agreement, the penalty became forfeited it might be recovered; after which there could be no further recovery upon the obligation; because, by recovery of the penalty, the whole was satisfied.<sup>2</sup>

§ 472. **Statute of 8 and 9 William III.** It was provided, however, in substance, by statute, enacted in 1697 in England, that in all actions in courts of record upon any bond or for the recovery of any penal sum for the non-performance of any covenants or agreements in any indenture, deed or writing contained, the plaintiff might assign as many breaches as he saw fit; and the jury might assess not only the usual damages and costs, but also damages for such of the breaches assigned as the plaintiff should prove. The ordinary judgment was to be entered on the verdict; and when given for the plaintiff on demurrer, by confession or *nil dicit*, he might suggest breaches on the roll; and upon writ of inquiry prove them and recover damages; upon the defendant's paying either upon execution or into court the damages assessed with costs, further execution upon the judgment was to be stayed; but the judgment remained as a security to answer further breaches which might again be suggested on *scire facias*, when a similar trial and proceeding were required.<sup>3</sup> The assignment of breaches under this statute was held compulsory,

<sup>1</sup> *Lowe v. Peers*, 4 Burr. 225; *Noyes v. Phillips*, 60 N. Y. 408; *Thompson v. Rose*, 8 Cow. 266; *Stroble v. Large*, 3 Mc Cord, 112; *Haggart v. Morgan*, 4 Sandf. 198.

<sup>2</sup> *Id.*

<sup>3</sup> 8 and 9 Will. III., ch. 11, § 8.

because the statute was made for defendants, and was highly remedial, while it secured to the obligee all he in conscience ought to receive.<sup>1</sup> This statute was held to extend to all bonds and deeds for the performance of covenants or payment of money which were of a divisible nature and capable of partial breach or a succession of breaches; or from the violation of which only part of the damages guarded against might arise.<sup>2</sup> It includes, therefore, bonds for the payment of money by instalments;<sup>3</sup> for the payment of an annuity;<sup>4</sup> for the performance of an award;<sup>5</sup> and where a bond is conditioned for the payment of a single sum, and also for the performance of other covenants, breaches must be assigned, though the action is merely brought to recover the single sum, for which purpose it is like the common money bond;<sup>6</sup> for in all such cases, as the plaintiff would have been entitled at law to issue execution to the full amount of his judgment, the defendant would have been forced to an expensive remedy in equity.<sup>7</sup>

§ 473. **Statute of 4 and 5 Anne.** Another statute was passed soon afterwards, providing for relief at law against penalties in money bonds conditioned for the payment of a lesser sum at a time certain. By this statute it was pro- [4] vided that where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have before action paid to the obligee, his executors or administrators the principal and interest due by the defeasance or condition, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition and defeasance, and had been so pleaded. It also provided that if at any time pending an ac-

<sup>1</sup> *Roles v. Rosewell*, 5 T. R. 538; 668; *Randall v. Burton*, 23 Up. Can. Hardy v. Bern, id. 636; *Van Benthuysen v. De Witt*, 4 Johns. 213; C. P. 268.

*Hodges v. Suffelt*, 2 Johns. Cas. 406. <sup>4</sup> *Walcott v. Golding*, 8 T. R. 126; *Ryan v. Massey*, 2 Ir. C. L. 642.

<sup>2</sup> *Wood's Mayne on Dam.* 338.

<sup>5</sup> *Welch v. Ireland*, 6 East, 613.

<sup>3</sup> *Willoughby v. Swinton*, 6 East, 530; *Harrington v. Cox*, 3 Ir. C. L. 87; *Hodgkinson v. Wyatt*, 1 D. & L.

<sup>6</sup> *Quin v. King*, 1 M. & W. 42.  
<sup>7</sup> *Wood's Mayne on Dam.* 338.

tion upon any such bond with a penalty the defendant brings into court where the action is depending all the principal money and interest due thereon, and also all such costs as have been expended in any suit at law or in equity upon such bond, the money so brought in shall be deemed and taken to be in full satisfaction and discharge of the bond, and the court shall and may give judgment to discharge the defendant from the same accordingly.<sup>1</sup> This act applies wherever a single sum is, by the condition, payable at a certain time; or is contingently so payable, after the contingency has happened. Thus, it is held to apply to *post obit* bonds;<sup>2</sup> to bonds for payment of interest and principal where both have become due,<sup>3</sup> even though the money became payable in consequence of certain provisions in an indenture of even date; provided, that by the course of pleading the jury have found that the money had become payable;<sup>4</sup> to bonds for payment of principal and interest, with proviso, that on default of paying the interest maturing before the principal the whole amount of principal and interest should become due.<sup>5</sup>

§ 474. **American statutes and practice.** Similar statutes have been enacted in this country. They are not all precisely [5] the same, nor has a uniform practice been adopted. They accomplish, however, the same purpose by avoiding the necessity of resorting to equity for relief from the penalty on paying or suffering recovery for such damages, not exceeding the penalty, as are a just compensation for non-performance of the condition. In most cases falling within the provisions of the statute of William special breaches are required to be assigned, and either successive recoveries are allowed therefor, or else upon any breach of the condition full damages are assessed once for all as upon a total breach.<sup>6</sup>

<sup>1</sup> 4 and 5 Anne, ch. 16, §§ 12, 13. See 23 and 24 Vic., ch. 26, § 25.

<sup>2</sup> Murray v. Earl of Stair, 2 B. & C. 82; Cardozo v. Hardy, 2 Moore, 220.

<sup>3</sup> Smith v. Bond, 10 Bing. 125; 2 D. & L. 460.

<sup>4</sup> Smith v. Bond, 10 Bing. 125; 2 D. & L. 460; Darbishire v. Butler, 5 Moore, 193.

<sup>5</sup> James v. Thomas, 5 B. & Ad. 40;

Husband v. Davis, 10 C. B. 645; Marriage v. Marriage, 1 C. B. 761.

<sup>6</sup> Waldo v. Forbes, 1 Mass. 10; Gardner v. Niles, 16 Me. 279; Burbank v. Berry, 22 Me. 483; Gennings v. Norton, 35 Me. 308; Whitney v. Slayton, 40 Me. 224; Philbrook v. Burgess, 52 Me. 271; Sibley v. Rider, 54 Me. 463; Fales v. Hemenway, 64 Me. 373; Webb v. Webb, 16 Vt. 636;

Neither the statute of William nor the American statutes as a rule provide for a bond conditioned for the performance of a collateral undertaking, as a bond of indemnity. And where judgment on such a bond is entered under a warrant, the execution following the judgment goes for the penalty if nothing is shown by the record to restrain the plaintiff from collecting the whole sum. He proceeds, however, at his peril, subject to the interference of a court of equity, if he takes execution before there has been a breach of the condition, or if after a breach he directs the collection of a larger sum than the damages actually sustained. In either case equity will restrain the execution, direct an issue of *quantum damnificatus*, and, when the damages are ascertained upon the trial of such an issue, it will grant relief upon their payment.<sup>1</sup>

Under the code it has been intimated that breaches [6]

Clammer v. State, 9 Gill, 279; Dale v. Moulton, 2 Johns. Cas. 205; Rozenkrantz v. Durling, 29 N. J. L. 191; Moore v. Fenwick, 1 Gilmer (Va.), 214; Clark v. Goodwin, 1 Blackf. 73; Mitchell v. Porter, 3 id. 499; Rany v. Governor, 4 id. 2; Nelson v. Gray, 2 G. Greene (Ia.), 397; Cameron v. Boyle, id. 154; Spalding v. Millard, 17 Wend. 331; Harmon v. Dedrick, 3 Barb. 192; Hughes v. Smith, 5 Johns. 168; Munroe v. Allaire, 2 Caines, 320; Van Benthuyzen v. De Witt, 4 Johns. 213; Allen v. Watson, 16 id. 205; Nelson v. Bostwick, 5 Hill, 37; Hodges v. Suffelt, 2 Johns. Cas. 406; Patterson v. Parker, 2 Hill, 598; Rogers v. Coleman, 3 Cow. 62; Smith v. Jansen, 8 Johns. 111; Caverly v. Nichols, 4 id. 189; Cook v. Tousey, 3 Wend. 444; Shaffer v. Lee, 8 Barb. 412; Turner v. Hadden, 62 id. 480; Sprague v. Seymour, 15 Johns. 474; Farnham v. Mallory, 3 Keyes, 527; Western Bank v. Sherwood, 29 Barb. 383; Howard v. Farley, 18 Abb. Pr. 260; 19 id. 126; 3 Rob. 308; O'Connor v. Such, 9 Bosw. 318; Van Wyck v. Montrose, 12 Johns. 350; Browne v. Hallett, 1 Caines, 517; Ryerson v. Minton, 3 Edw. Ch. 382; Wood v. Wood, 3 Wend. 554; Clark v. State, 7 Blackf. 570; Karch v. Commonwealth, 3 Pa. St. 269; State v. Lawson, 2 Gill, 62; State v. McAlpin, 6 Ired. 347; Black v. Caruthers, 6 Humph. 87; Armstrong v. State, 7 Blackf. 81; Hinckley v. West, 9 Ill. 136; Scarborough v. Thornton, 9 Pa. St. 451; Arnold v. Commonwealth, 8 B. Mon. 109; Sims v. Harris, id. 55; Ray v. Justices, 6 Ga. 303; State v. Votaw, 8 Blackf. 2; Walcott v. Harris, 1 R. I. 404; Toles v. Cole, 11 Ill. 562; Fleming v. Tolee, 7 Gratt. 310; Scott v. State, 2 Md. 284; Governor v. Wiley, 14 Ala. 172; Garnett v. Yoe, 17 Ala. 74; Garrett v. Logan, 19 Ala. 344; Wilson v. Cantrel, 19 Ala. 642; Trice v. Turrentine, 13 Ired. 212; James v. State, 3 Md. 211; Young v. Reynolds, 4 Md. 375; Rubon v. Stephan, 25 Miss. 253; Mitchell v. Laurens, 7 Rich. 109; Witmore v. Rice, 1 Biss. 237; State v. Ford, 5 Blackf. 393; Richman v. Richman, 10 N. J. L. 114; Dent v. Davison, 52 Ill. 109.

<sup>1</sup> Per Chancellor Bates in *Staats v. Herbert*, 4 Del. Ch. 508, 519, citing 2 Story's Eq., § 1314; *Sloman v. Walter*, 1 Bro. Ch. 418; *Errington v. Aynesley*, 2 id. 342; *Hardy v. Martin*, 1 Cox, 64.



should in all cases be assigned because the cause of action is required to be stated in ordinary and concise language.<sup>1</sup> In some states an action of debt may be brought on a money bond as soon as there is any default in the payment of interest or any instalment of the principal;<sup>2</sup> in others, not until all the moneys payable by the condition are due.<sup>3</sup> In Arkansas debt will not lie until all the instalments are due, but covenant may be brought when one becomes due.<sup>4</sup> By the general practice judgment is rendered for the penalty, but it is only nominally the debt; the breach of the condition is treated as the gist of the action.<sup>5</sup> Where damages are assessed upon particular breaches the judgment for the penalty is to be enforced only to the extent of such damages.<sup>6</sup> If such a judgment be sued on in another state, the damages which had been assessed for the breaches measure the recovery.<sup>7</sup> Though in the court where originally rendered it stands as security for further breaches, they cannot be assigned when the judgment is sued on in another jurisdiction.<sup>8</sup> If a bond is accompanied by a condition to do an illegal act it is void; but if the condition is illegal in part only, and that part severable, perhaps only void *pro tanto*.<sup>9</sup>

<sup>1</sup> Western Bank v. Sherwood, 29 Barb. 383.

<sup>2</sup> Dupuy v. Gray, 1 Ala. 357; Thatcher v. Taylor, 3 Munf. 249; Galbraith v. O'Bannon, Sneed (Ky.), 61; Nailor v. Kearney, 1 Cranch C. C. 112; Davidson v. Brown, id. 250.

<sup>3</sup> Booth v. Hall, 6 Md. 1; Peyton v. Harmon, 22 Gratt. 643. See Platt on Covenants, 545.

<sup>4</sup> State v. Scroggin, 10 Ark. 326.

<sup>5</sup> Murphy v. Sommerville, 7 Ill. 360.

In Wilson v. Spencer, 11 Gratt. 261, the judgment was rendered for the damages assessed instead of the penalty. It was held that the judgment was not entered in proper form; yet, as the error produced no injury to the defendant, it was not reversed. Pate v. Spotts, 6 Munf. 394. Compare Wales v. Bogue, 32 Ill. 464; Scarborough v. Thornton, 9 Pa. St. 451; State v. Cross, 6 Ind. 387.

<sup>6</sup> Van Wyck v. Montrose, 12 Johns. 350.

<sup>7</sup> Battey v. Holbrook, 11 Gray, 212.

<sup>8</sup> Id. In People v. Compher, 14 Ill. 447, a judgment was obtained by the people on an official bond against the sheriff and his sureties for the penalty in the circuit court of St. county, and it was held that a subsequent assignment of breaches was not a distinct action, but was to be regarded as part of the original suit; and therefore the fact that the defendants resided in different counties from that in which the judgment was rendered, and were served with notice of such subsequent assignments of breaches where they resided, did not oust the court of jurisdiction.

<sup>9</sup> Greenwood v. Colcock, 2 Bay, 67; Brown v. Gitchell, 11 Mass. 11; Lowrey v. Barney, 2 Chip. 11; Kavanaugh v. Saunders, 8 Me. 422; State v. Findley, 10 Ohio, 51.

§ 475. **Statutory bonds.** A statutory bond has been held vitiated by the omission of a material condition required by the statute.<sup>1</sup> The principle is well settled that official bonds are valid if the condition substantially complies with the statute. The exact form prescribed is not essential unless made so by the charter or act.<sup>2</sup> Courts do not favor technical objections to such bonds, and when not strictly in compliance with the statute they have been sustained as voluntary obligations, the conditions of which secure performance of official duty and contain nothing contrary to law.<sup>3</sup> There is a con-

<sup>1</sup> *Dixon v. United States*, 1 Brock. 177. See *Justices v. Wynn*, *Dudley* (Ga.), 22. As to the effect of taking a statutory bond with a larger penalty or a severer condition than that prescribed, see also *Commonwealth v. Lamb*, 1 W. & S. 261; *Woods v. State*, 10 Mo. 698; *People v. Carbannes*, 20 Cal. 525.

If the conditions of a bond are not all sustainable, those which are good, if separable from the others, may be the subject of an action in case of a breach. *United States v. Mora*, 97 U. S. 413. See *United States v. Hodson*, 10 Wall. 395; *Speck v. Commonwealth*, 3 W. & S. 324; *United States v. Gordon*, 1 Brock. 190; S. C., 7 Cranch, 287; *Kavanaugh v. Saunders*, 8 Me. 422; *Hall v. Cushing*, 9 Pick. 404; *Sanders v. Rives*, 1 Stew. 109; *United States v. Morgan*, 3 Wash. C. C. 10; *United States v. Tingey*, 5 Pet. 129; *United States v. Brown*, *Gilpin*, 155; *Vroom v. Smith*, 14 N. J. L. 479; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378.

Where there is a discrepancy between the condition and the penal portion of the bond, it will be held single, and the obligee entitled to the whole amount. But to support the condition the court will transpose or reject insensible words, and construe it according to the obvious intention of the parties. *Swain v. Graves*, 8

Cal. 549. See *Stockton v. Turner*, 7 J. J. Marsh. 192; *Butler v. Wigge*, 1 Saund. 65.

<sup>2</sup> *Dill. on Mun. Corp.*, § 155; *Alleghany Co. v. Van Campen*, 3 Wend. 49; *People v. Holmes*, 2 id. 281; id. 615; *Fellows v. Gilman*, 4 id. 414; *Lawton v. Erwin*, 9 id. 233; *Cornell v. Barnes*, 7 Hill, 35.

<sup>3</sup> *Dill. on Mun. Corp.*, § 155; *Mathews v. Lee*, 25 Miss. 417; *State v. Thomas*, 17 Mo. 503; *Postmaster-General v. Rice*, *Gilpin*, 554; *Davison v. Burgess*, 31 Ohio St. 78; *Bagby v. Chandler*, 9 Ala. 770; *Montville v. Houghton*, 7 Conn. 543; *Stephens v. Crawford*, 3 Ga. 499; S. C., 1 id. 574; *Commonwealth v. Wolbert*, 6 Bin. 292; *Governor v. Allen*, 8 Humph. 176; *Gathwright v. Callaway*, 10 Mo. 663; *Thomas v. White*, 12 Mass. 369; id. 314; *Kavanaugh v. Saunders*, 8 Me. 442; *Sweetzer v. Hay*, 2 Gray, 49; *Supervisors v. Coffinbury*, 1 Mich. 355; *Horn v. Whittier*, 6 N. H. 88; *State v. Perkins*, 10 Ired. 333; *Dalton v. Miami Tribe No. 1*, 2 Am. L. Record (Ohio), 329; *People v. Johr*, 22 Mich. 461; *Justices v. Ennis*, 5 Ga. 569; *McCroskey v. Riggs*, 12 S. & M. 712. Compare *Tucker v. Hart*, 23 Miss. 548; *Stevens v. Hay*, 6 Cush. 229; *Crawford v. Meredith*, 6 Ga. 552; *Supervisors v. Jones*, 19 Wis. 51; *Scarborough v. Parker*, 53 Me. 254; *Governor v. Mat'ock*, 2 Hawks, 366;

flict of authority concerning the liability of sureties upon bonds given pursuant to an unconstitutional statute, or in proceedings before courts which have no jurisdiction of the subject-matter. In Indiana the law is settled that a bond or recognizance taken by an officer or court acting wholly under a statutory power must be authorized by the statute or it will be void; and in suing upon such instrument the complaint must set out the facts showing that it was taken in a case in which the law authorized it, and in many cases it must appear that it was taken exactly or substantially in accordance with the statutory power.<sup>1</sup> In Missouri it is held that it is not a defense to the sureties, after their principal has obtained possession of a defendant's property by means of their bond, that the statute pursuant to which it was given was unconstitutional.<sup>2</sup> In California there is an apparent conflict in the decisions. In *Benedict v. Bray*<sup>3</sup> it is held that an attachment bond given in a case of which the court had no jurisdiction is void. In *McDermott v. Isbell*<sup>4</sup> it is ruled that it is no defense to an action on a replevin bond that the court in which the suit was pending was incompetent to try it.

[8] § 476. **Impossible condition.** If the condition be impossible when the bond is made, or becomes so afterwards by the act of God, the law, or the obligee, the penalty is saved; and the bond in the one case is void, and in the other is discharged.<sup>5</sup> But a bond for the performance of covenants is

*Johnson v. Gwathmey*, 2 Bibb, 186; *Stevens v. Treasurer*, 2 McCord, 107; *Grimes v. Butler*, 1 Bibb, 192; *Williamson v. Woolf*, 37 Ala. 298; *Cross v. Gabeau*, 1 Bailey, 211; *United States v. Tingey*, 5 Pet. 115; *Montville v. Houghton*, 7 Conn. 543; *Morrell v. Sylvester*, 1 Me. 248; *Smith v. Crocker*, 5 Mass. 538; *State v. Bowman*, 10 Ohio, 445; *Goodman v. Carroll*, 2 Humph. 490; *Lord v. Lancey*, 21 Me. 468.

<sup>1</sup> *Caffrey v. Dudgeon*, 38 Ind. 512, citing numerous cases in that state.

<sup>2</sup> *State v. Stark*, 75 Mo. 566.

<sup>3</sup> 2 Cal. 251.

<sup>4</sup> 4 Cal. 113. See § 485, *infra*.

<sup>5</sup> *Commonwealth v. Overby*, 80 Ky.

208; *Kirby v. Commonwealth*, 1 Bush, 114; *State v. Glenn*, 40 Ark. 332; *Phillipi v. Capell*, 38 Ala. 575; *Haralson v. Walker*, 23 Ark. 415; *Hanks v. Pickett*, 27 Tex. 97; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *People v. Bartlett*, 3 Hill, 570; *Barker v. Hodgson*, 3 M. & S. 267; *Brown v. London*, 9 C. B. (N. S.) 726; *White v. Mann*, 26 Me. 211; *Harmony v. Bingham*, 12 N. Y. 99; *Gilpins v. Consequa*, Peters' C. C. 86; *Clifford v. Watts*, L. R. 5 C. P. 577; *Ward v. Syme*, 8 N. Y. Leg. Obs. 95. See *Butler v. Wigge*, 1 Saund. 66; *Wild v. Harris*, 7 C. B. 1005; *Milward v. Littlewood*, 20 L. J. (Exch.)



not discharged by the condition becoming impossible by the death of the obligor. In a South Carolina case, involving this point, the court say: "Although the rule of law formerly was that the penalty was saved and the performance of the condition excused in such an event, yet in equity the condition was enforced as an agreement; and, if specific execution were impracticable, a compensation in damages, to be ascertained by an issue at law, was awarded to the obligee. And since the courts of law have been authorized by statute to assess the damages actually sustained in an action for the penalty, they may maintain original jurisdiction in those cases where equity would have granted relief by directing an issue at law."<sup>1</sup>

### § 477. Penalty limit of recovery, except as to interest.

The penalty is the limit of liability for breach of the condition of a bond. This proposition is universally admitted.<sup>2</sup>

2; *Brewster v. Kitchell*, 1 Salk. 198; *Warren v. Powers*, 5 Conn. 381; *Jones v. Howard*, 9 C. B. 19; *Appleby v. Meyers*, L. R. 2 C. P. 651; *Taylor v. Caldwell*, 2 B. & S. 826; *Boast v. Firth*, L. R. 4 C. P. 1. But see *Irion v. Hume*, 50 Miss. 419.

<sup>1</sup> *Miller v. Nichols*, 1 Bailey, 226. See *White v. Mann*, 26 Me. 361; *Allen v. State*, 6 Blackf. 252.

<sup>2</sup> *Hughes' Adm'r v. Wickliffe*, 11 B. Mon. 202; *Wilde v. Clarkson*, 6 T. R. 203; *McClure v. Dunkin*, 1 East, 436; *McKnight v. McLean*, 3 Brown Ch. 596; *Tew v. Winterton*, id. 496; *Woods v. Commonwealth*, 8 B. Mon. 112; *New Haven Bank v. Miles*, 5 Conn. 587; *Cherry's Ex'r v. Mann*, *Cooke* (Tenn.), 269; *Noyes v. Phillips*, 16 Abb. (N. S.) 400; S. C., 60 N. Y. 419; *Clark v. Bush*, 3 Cow. 151; *Payne v. Ellzey*, 2 Wash. (Va.) 143; *Hifford v. Alger*, 1 Taunt. 218; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Seamons v. White*, 8 Ala. 656; *Windham v. Coates*, id. 285; *Perry v. Denson*, 1 Greene (Iowa), 467; *King v. Brewer*, 19 Ind. 267.

In *Sweem v. Steele*, 5 Iowa, 352, an

action was brought on a bond in a penalty of \$100, conditioned to make title to land — verdict, \$224. The court was requested, but refused, to instruct the jury that they could not find for the plaintiff a greater amount than that specified in the bond given for, or to secure, a deed to the land. *Woodward, J.*: "The second instruction asked by defendant, that the plaintiff could not recover beyond the penalty of the bond, involves the question whether the plaintiff may sue in covenant on the condition of a bond. If he may thus sue, we understand all the books which treat of damages recoverable on bonds and penal obligations to mean that he must recover without respect to the penalty. And after a pretty full examination of the subject, yet with some hesitation on the part of one of the court, it is our opinion that an action as for covenant broken will lie upon a penal bond of the nature of the one before us. Of this character were the cases of *Stewart v. Noble*, 1 G. Greene, 26, and *Buckmaster v. Grundy*, 1 Scam. (Ill.) 310,



And in the case of private bonds it is also the measure of the [10] obligation where it is founded solely on the bond.<sup>1</sup> But it is only where a suit is brought thereon that this limitation is material or effective. If brought on a judgment rendered on a bond<sup>2</sup> or upon some distinct covenant in a bond or other obligation the penalty is unimportant. Where a debt is secured as such by securities in addition to a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations.<sup>3</sup> If the bond debtor resorts to equity

in which neither counsel nor court took any exception on this ground; and, although the damages actually rendered by the jury in these cases were within the penalty, still the rule of damage laid down and maintained in one of them did not restrict them to the penalty; and the other case comes within the principle of *Foley v. McKeegan*, 4 Iowa, 1, the obligor having died without neglect of performance." The refusal of the instruction was held not erroneous. The judges were different when the case got to the supreme court again (10 Iowa, 374), and then *Lowe, C. J.*, said: "If the facts set out in the petition were true, although not established, it would seem that the acts of the defendant most complained of, and the consequent damages accruing to the plaintiff, resulted from a breach of trust which occurred before the execution and delivery of the bond sued upon; and that the penalty in the bond was agreed upon as liquidated damages in the event the defendant should fail to obtain for plaintiff the title to the land in question; and it is more than doubtful in the case as stated whether the plaintiff, under any circumstances, should recover more than the penalty of the bond."

In *Hughes v. Wickliffe*, 11 B. Mon. 209, *Graham, J.*, said: "In nearly all, if not in all, the cases in which damages exceeding the penalty have

been given, there is an express and not an implied covenant in the condition that the obligor must do or omit some particular act; and where that is not the case, it is manifest, as in *Graham v. Bickham*, 4 Dall. 149, that the parties could not and did not intend the liability of the obligor to be limited by the penalty." *Baker v. Cornwall*, 4 Cal. 15.

<sup>1</sup>*Spencer v. Perry*, 18 Mich. 394. See *Niven v. Jardine*, 23 Up. Can. C. P. 470. The defendants gave a bond to the plaintiff in the sum of \$45, conditioned to pay him \$45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being raised. He then sued for the sixth year, and the question of defendant's liability was left to the court without pleadings. It was held that covenant clearly would not lie; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defense; and that the defendants were entitled only to have satisfaction entered on payment of penalty and costs.

<sup>2</sup>*Blackmore v. Flemmying*, 7 T. R. 442; *McClure v. Dunkin*, 1 East, 436.

<sup>3</sup>*Clarke v. Abingdon*, 17 Ves. 106; *Mower v. Kip*, 6 Paige, 91.

to obtain relief from legal proceedings it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to its jurisdiction, to do what was just under the circumstances, and not be allowed to reap advantage from a delay which he compelled his adversary to undergo.<sup>1</sup> So equity will carry the debt beyond the penalty where the obligee is kept out of his money by injunction or is prevented from going on at law.<sup>2</sup> So where an advantage is made of the money.<sup>3</sup> The sole ground upon which relief in equity has been denied to the obligee of a money bond beyond the amount of the penalty is that at law the bond creditor is only entitled to the penalty of the bond; and where he comes into equity for a legal demand, equity will give the same relief as he would have been entitled to at law.<sup>4</sup>

<sup>1</sup> *Fraser v. Little*, 13 Mich. 195, per Campbell, J.; *Mackworth v. Thomas*, 5 Ves. 329; *Tew v. Winterton*, 3 Brown Ch. 489; *Knight v. McLean*, id. 496; *Hughes v. Wynne*, 1 M. & K. 20; *Clarke v. Sexton*, 6 Ves. 411; *Clarke v. Abingdon*, 17 Ves. 106; *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 598; S. C., 3 Sim. 341; *Jeudwine v. Agate*, 3 Sim. 129; *Walters v. Meredith*, 3 Y. & Coll. 264; *Hugh Andley's Case*, Hardress, 136.

<sup>2</sup> *Pulteney v. Warren*, 6 Ves. 92.

<sup>3</sup> *Lord Dunsany v. Plunkett*, 2 Bro. P. C. 251.

<sup>4</sup> *Long v. Long*, 16 N. J. Eq. 59; *Grosvenor v. Cook*, 1 Dick. 208; *Hale v. Thomas*, 1 Vernon, 349; *Mackworth v. Thomas*, 5 Ves. 330.

In *Long v. Long*, *supra*, Chancellor Green discusses the anomalies of our jurisprudence relating to bonds with great learning and vigor. He says: "At law the penalty of the bond has always been considered the debt. Originally the obligor at law was required to pay the penalty as the debt, and could only be relieved in equity by paying the principal and interest money due. Such was originally its design, and such to this day it is in

form: a debt justly due to be paid, the obligation to be void only upon the performance of the condition. It is clear, said the master of the rolls in *Clarke v. Sexton*, 6 Ves. 415, that both at law and in equity the penalty is the debt, and upon this very ground it is urged that no interest can be recovered beyond the penalty. But if it be a debt, and if that debt become due, as it clearly does at law (in form at least), upon the breach of the condition, and judgment may be entered upon it, why may not interest be reckoned either upon the principal specified in the condition, or upon the penalty to an amount equal to the sum due upon the bond? No form or principle of law is thereby violated. It is the constant practice of courts of law to recover interest beyond the penalty in the shape of damages; and yet the court of chancery in England, planting itself upon the rule at law, refuses to afford relief, which is both equitable and in accordance with the intention of the parties. The English penal bond is in form an anomaly. The bond is not given for the actual debt, but for the penal sum,

[12] In a few cases where a bond has been given for a money demand, and the sum mentioned in the formal part and in the condition is the same, or nearly so, and that sum the actual debt, it has been recovered with the stipulated interest. The

with condition that if the real debt and interest are paid at maturity the bond is satisfied. If not paid at maturity the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no: whatever may be the form, in substance the amount of the obligation is a mere penalty which the obligee shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt is but the penalty. The form is retained; the substance is changed. But if the form of the bond and the form of the remedy upon it are anomalous, the justice meted out to the parties is still more so. Equity says to the obligee, you shall not have the sum which the obligor bound himself to pay, and which he has acknowledged to be due, because, though in form a debt, in substance it is a penalty. The sum specified in the condition, with interest, is the real debt. But the moment the real debt exceeds the penalty, and the obligee asks for the amount due, the answer is, the penalty is the debt, and you can have no more. But if the penalty is the debt, and the real debt and interest exceeds the penal sum, so that it is no longer inequitable to demand it, why shall not the obligee have interest on the penalty? Courts of law say he shall have it in the form of damages for the detention of the debt. Shall a court of equity hesitate to give it?

anomalous attitude of the English courts upon the question, is thus clearly presented by Mr. Evans in his notes to Pothier. 2 Pothier on Obl. (3d Am. ed.) 93: 'The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty, but also of the interest on that penalty, which is the proper damages for its detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that, the case of *Holdipp and Otway*, 2 Saund. 106, is a decisive authority. By the forms of law, one shilling damages is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes by their being extended so far as may be necessary for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect to bonds for securing money, when the principal and interest amount to more than the formal penalty. Whilst the court restrains the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose on

"The justice of the claim, and the



fact that the amount exceeded the sum so stated in the [13] formal part of the bond has not been regarded.<sup>1</sup> The sum stated was not considered as in the nature of a penalty; the bond was, therefore, allowed to operate as single.<sup>2</sup>

§ 478. **Same subject.** The condition of a penal bond not being an affirmative undertaking, but only at law an optional defeasance of the bond, the penalty fixes the extent of liability in case the condition is not performed. When the penalty became the actual debt under the old law, upon the forfeiture, the amount of it was the precise sum demandable except dam-

the one hand, it is very unequal justice not to allow the full extent of that operation when it is necessary to enforce such purpose on the other. And it is the more extraordinary that courts of equity, which in other cases so far sacrifice the form to the substance of the transaction as to enforce the specific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the performance of the agreement, should so completely deviate from that practice in the very instance of all others where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with the most facility ascertained. But so are the precedents; it is easier to follow precedents than to investigate principles, and there is often a timidity in deviating from even those precedents which are most at variance with principles.'

. . . "I think both upon principle and upon authority, the plaintiff in an action upon a penal bond, with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty in the shape of damages for the detention of the

debt. This being the relief to which the plaintiff is entitled at law, it is clear that the complainant in *equity* is entitled to at least as full relief. The only difficulty, as we have seen, in the obligee's recovering in equity the full amount of principal and interest due him upon the bond has been that the plaintiff, coming into equity to recover a legal demand, can recover no more than he would do at law. Independently, therefore, of all precedent or authority directly upon the question, I should hold that upon a bill in this court for the recovery of a bond debt, either upon the bond itself or a mortgage to secure the bond, the complainant may recover the full amount of principal and interest due upon the bond, though it exceed the amount of the penalty. And this upon the ground that it is the debt justly due, that it is in accordance with the intention of the parties, and that it violates no principle of law or equity. Equity will disregard the form in which the remedy is obtained, and look alone to the substance of the transaction."

<sup>1</sup> Fleming v. Toler, 7 Gratt. 310; United States v. Arnold, 1 Gall. 348; Francis v. Wilson, Ryan & M. 105; Lonsdale v. Church, 2 T. R. 388; Smedes v. Hooghtaling, 3 Caines, 48.

<sup>2</sup> Fleming v. Toler, *supra*.



ages for its subsequent detention; and since the change in the law by which only a nominal forfeiture is recognized, and recovery is practically limited to the damages actually sustained by breach of the condition, the penalty has continued to be the utmost that can be recovered; for the change was intended for the benefit of the obligor. He is entitled to be discharged from the obligation of the bond when due by paying the penalty, however much the actual damages for breach of the condition may exceed it in amount.<sup>1</sup> But if such damages exceed [14] the penalty it has been made a question whether the amount of recovery can be increased beyond the amount of the penalty by interest from the time when the penalty, or damages to an equal amount, became due.

A distinction has sometimes been made between sureties and principals, the penalty being held as absolutely the limit in respect to the former.<sup>2</sup> And in certain cases interest has been allowed beyond the penalty as damages for its detention on money bonds, while the rule has been stated to exclude interest, beyond it, on bonds with other collateral conditions.<sup>3</sup> The cases which refuse interest beyond the penalty proceed on the technical ground that the penalty does not become the debt by the damages reaching an equal amount; and hence there can be no default predicated of the obligor's omission to pay it. Campbell, J., in a thoroughly considered Michigan case, pointedly remarked that "when an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never becomes the actual debt except by way of forfeiture; and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases . . . from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon

<sup>1</sup> Atwell's Adm'r v. Towles, 1 Munf. 175; Brangwin v. Perrott, 2 W. Black. 1190; Wilde v. Clarkson, 6 T. R. 303; Clark v. Seyton, 6 Ves. 411; McClure v. Dunkin, 1 East, 436; Hellen v. Ardley, 3 G. & P. 12; White v. Sealey, 1 Doug. 49; Carter v. Thorn, 18 B. Mon. 613; Culver v. Green, 4 Hill, 570.

<sup>2</sup> Leggett v. Humphrys, 21 How. (U. S.) 66; Farley v. Lawson, 5 Cow. 424; Clark v. Bush, 3 Cow. 151; Pitts v. Tilden, 2 Mass. 118; Mower v. Kip, 6 Paige, 88; Ansley v. Mock, 8 Ala. 444; Seamons v. White, id. 656.

<sup>3</sup> Robbins v. Long, 16 N. J. Eq. 59; Ives v. Merchants' Bank, 12 How. (U. S.) 159, 164. •

forfeiture, are entirely unsupported, and would probably never have been made had not the actual debt in these cases equaled or exceeded the penal sum. As authorities, they are based upon a false assumption, and cannot be maintained on any such principle.”<sup>1</sup> The weight of American authority, however, is in favor of allowing interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach; interest is afterwards given, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for breach of the [15] condition to the amount of the penalty had attached.<sup>2</sup> [16]

<sup>1</sup> *Fraser v. Little*, 13 Mich. 195; *State v. Sandusky*, 46 Mo. 377.

<sup>2</sup> *Brainard v. Jones*, 18 N. Y. 35; *Long v. Long*, 16 N. J. Eq. 59; *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42; *Bonsall v. Taylor*, 1 McCord, 503; *Carter v. Thorn*, 18 B. Mon. 613; *Harris v. Clap*, 1 Mass. 308; *Pitts v. Tilden*, 2 id. 118; *Waldo v. Forbes*, 1 id. 10; *Lyon v. Clark*, 8 N. Y. 148; *Baker v. Morris*, 10 Leigh, 284; *Tenants v. Gray*, 5 Munf. 494; *Roane's Adm'r v. Drummond*, 6 Rand. 182; *Tazwell's Ex'r v. Saunders' Ex'r*, 13 Gratt. 354; *State v. Wyllie*, 2 Strob. 114; *Bank of Brighton v. Smith*, 12 Allen, 243; *Carter v. Carter*, 4 Day, 30; *United States v. Arnold*, 1 Gall. 348; *Bank of U. S. v. Magill*, 1 Paine, 661; *Marshall v. Winter*, 43 Miss. 666; *Maryland v. Wayman*, 2 Gill & J. 279; *Sillivant v. Reardon*, 5 Ark. 140; *Allen v. Grider*, 24 id. 271; *Fraser v. Little*, 13 Mich. 195, per *Christiancy, J.*; *Boyd v. Boyd*, 1 Watts, 365; *Potter v. Webb*, 6 Me. 14; *Hughes v. Hughes*, 54 Pa. St. 240; *Roulain v. McDowall*, 1 Bay, 490; *Judge of Probate v. Heydock*, 8 N. H. 491; *Burchfield v. Haffey*, 34 Kan. 42, overruling *Simmons v. Garrett*, McCahon, 82; *Clark v. Wilkison*, 59 Wis. 543; *Wyman v. Robinson*, 73 Me. 384; *Carlson v. Dixon*, 14 Ore. 293; *Crane v. Andrews*, 10 Colo.

265. See *Perrett v. Wallis*, 2 Dall. 252; *Ritchie v. Shannon*, 2 Rawle, 196; *Norris v. Pitmore*, 1 Yeates, 408; vol. 1, § 331.

In *Tazwell's Ex'r v. Saunders' Ex'r*, 13 Gratt. 354, *Moncure, J.*, said: “I think, therefore, the true doctrine with us is that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty; the only difference between the forums being that, according to the strict rules of law, the penalty must still be considered in form as the debt, and the excess of interest can only be recovered indirectly in the shape of damages; while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should in all cases be given, though there be a penalty, and the principal and interest exceed it, wherever full interest would be given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond.”

*Pettes v. Tilden*, 2 Mass. 118, was ejectionment on a mortgage; objection to entering judgment for more than the penalty of the bond. It was

For the purpose of recovering interest beyond the penalty after breach it does not appear to be necessary to consider the penalty the debt; it has its proper effect in limiting the

said: "This has never been questioned except in the case of a surety. It has been ruled so often in the case of the principal that the point cannot now be brought in question. It rests on principles of law as well as equity."

Harris v. Clap, 1 Mass. 308: Debt on bond to secure performance of an award and payment within one hundred and twenty days. It was held that the award had force from acceptance by the court of common pleas and judgment upon it there; that interest on the amount of the award, which was less than the penalty, from that time might be recovered though exceeding the penalty. Sedgwick, J., dissenting.

United States v. Arnold, 1 Gall. 348; Story, J.: "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." Referring to this case, Campbell, J., in *Fraser v. Little*, 13 Mich. 195, said: "Although interest was awarded on a penalty, yet the question of such allowance was not discussed, and is not mentioned on the appeal." 9 Cranch, 104.

Mower v. Kipp, 6 Paige, 88: Mortgage to secure \$1,650 mentioned in the condition of the bond; decree for the actual debt, which exceeded the penalty.

Smedes v. Hooghtaling, 3 Caines, 48; Kent, C. J.: "Interest is recoverable beyond the penalty, but it depends on principles of law, and is not an arbitrary, *ad libitum* discretion in the jury."

Warner v. Thurlo, 15 Mass. 154: Suit on replevin bond; the actual damages, interest and costs amounted to more than the penalty. The court held that recovery might be had of the penalty, and interest from the commencement of the suit. It is said that no case in Massachusetts goes further than that.

Wild v. Clarkson, 6 T. R. 303: Bond of indemnity to parish against the expense of a bastard child; application to pay penalty into court in full satisfaction allowed. *Lonsdale v. Church* overruled. Kenyon, C. J.: "Suppose the plaintiff proceeds in this action, and no defense is made to it: the judgment would be for the penalty of the bond and 1s. nominal damages for detention of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, etc., the act of parliament (8 & 9 Will. 3, ch. 11, sec. 8) expressly says there shall be judgment for the penalty; and that the judgment shall stand as security for further breaches, but the obligor is not answerable, *in the whole*, beyond the amount of the penalty."

McClure v. Dunkin, 1 East, 437: Judgment rendered on a bond in Ireland; *assumpsit* brought on that judgment; interest upon it was included in the recovery; motion to reduce the judgment to the penalty and costs of the first judgment, based on the supposed doctrine that there can be no recovery on a bond debt for more than the penalty and costs. Kenyon, C. J.: "If this had



amount of damages when the condition was broken. If [17] the damages amounted then to the penalty, and could then have been assessed and their collection absolutely enforced, no

been an action on the bond, the objection would have holden good; but after judgment recovered, *transit in rem judicatam*, the nature of the demand is altered; and this being an action on the judgment, it was competent for the jury to allow interest to the amount of what was due."

*Lonsdale v. Church*, 2 T. R. 388: Defendant was receiver of harbor dues of Whitehaven, appointed by plaintiffs, who were trustees for carrying into execution acts of parliament relating to that harbor; he entered into three bonds, 2,000*l.* each, conditioned to account to plaintiffs for all the moneys received. On being called on to account he admitted he had 5,400*l.* in his hands. The trustees, supposing he had received interest for several parts of that sum, filed a bill for discovery, and brought three actions on the bonds. The defendant obtained a rule calling on the plaintiffs to show cause why a stay should not be granted in two of the actions on payment of the penalties into court; and why a reference should not be granted to compute the amount due for principal in the third; and why, on payment of what a master might think due, and costs, a stay should not be granted. Buller, J., allowed the payment into court in two actions, but refused a stay; he was not satisfied with the determination of *White v. Sealy*, 1 Doug. 49.

In *Elliot v. Davis*, Bunb. 22, in an action on a bond, decree was made for the whole amount, though it exceeded the penalty. Lord Mansfield, in another case, said the penalty is mere security, and when it is not

sufficient, the plaintiff may recover damages as well as penalty. Nothing can prove the principle stronger than the constant practice where an action is brought on a bond of giving 1*s.* damages.

*Dewall v. Price*, 2 Show. P. C. 15: Debt on a bond; penalty 140*l.*; bill in chancery; reference to compute principal, interest and costs; principal 154*l.*; costs 67*l.*; decree for all.

*White v. Sealy*, 1 Doug. 49: Held that sureties were not liable for more than the penalty, though the bond was given for payment of the yearly rent, nearly as large as the penalty on a twenty years' lease.

In *McKnight v. McLean*, 3 Brown Ch. 496, Buller, J., sitting in an equity cause, allowed interest beyond the penalty of a bond, but he was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law.

*Bromley's Case*, 1 Atk. 75: Where a bankrupt's estate was sufficient to pay all, with a large surplus, creditors whose debts carried interest were allowed it from the time the computation was stopped by the commission, but such as were creditors by bond, not beyond their penalties.

*Bunscombe v. Scarborough*, 6 Q. B. 13: Recovery on replevin bond limited to penalty and costs. *Lonsdale v. Church* treated as overruled, and stated that *Francis v. Wilson* did not re-establish it. Doubt expressed whether 1*s.* damages for detention of debt in such cases is right. See *Shut v. Proctor*, 2 Marsh. 226; *Brangwin v. Perrot*, 2 W. Black. 1190.

*Anonymous*, 1 Salk. 154: If one,



[18] principle is violated by allowing interest from that time, if the matter of the condition be such that interest would accrue from such default had there been no penalty. Interest

by will, subjects his lands to payment of his debts, those barred by statute of limitations are to be paid; but bond debts, on which interest has overrun the penalties, held not to carry interest beyond the penalty; but if the trustee omits to pay in a reasonable time, he must pay interest after such neglect.

*Heffrod v. Alger*, 1 Taunt. 218: Replevin bond Lord Mansfield, speaking of a bond to pay a smaller sum, said it is very reasonable to calculate interest on the sum secured by the condition; but when the principal and interest equal the amount of the penalty, the interest must thenceforth cease.

*Hughes v. Wynne*, 1 M. & K. 20: A person conveyed estates to trustees upon trust, to sell and apply the proceeds to discharge all his bond debts, together with the interest then due and to grow due to the day of payment; held, that a bond creditor was not entitled to principal and interest beyond the penalty.

*Clarke v. Abingdon*, 17 Ves. 106: Debt secured by a bond and mortgage, the latter securing not the bond in terms, but the debt. Master of the rolls: "If he sues upon the former (bond) he cannot have interest beyond the penalty; but the mortgage is to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either; and if he resorts to the mortgage, the penalty is out of the question."

*Johnes v. Johnes*, 5 Taunt. 656: After judgment on a bond, affirmed, motion made for interest accruing between judgment and affirmation; refused on statute 8 & 9 Will. 3.

*Grant v. Grant*, 3 Sim. 340; S. C., 3 Russ. 598: Where an obligor has, by vexatious proceedings, delayed the obligee in recovering on his bond, a court of equity will decree payment of the full amount of principal and interest although it exceeds the penalty of the bond. See *Pultney v. Warren*, 6 Ves. 79.

*Jeudwine v. Agate*, 3 Sim. 129: Obligees held entitled to be paid out of the assets of the deceased obligor a sum exceeding the penalty. Held, that the doctrine of equity is that, "wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, there, notwithstanding the agreement appear in the form of a bond with a penalty, the court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty." See *Kirwane v. Blake*, 4 Brown P. C. (Toml. ed.) 532.

Where an action is brought by a common informer no damages for detention of the penalty can be obtained. He has no right to the money before the action is commenced; and, therefore, it cannot be said to be detained from him. *Mayne on Dam.* 2.

But it is otherwise where the penalty is given to the party aggrieved. *North v. Musgrave*, 1 Roll. Abr. 574;

may properly be charged against sureties for delay after [19] it became their duty to pay, as well as against the principals.<sup>1</sup> In Maine and New York interest is recoverable from the date of the breach;<sup>2</sup> in Massachusetts from the time the action was begun.<sup>3</sup>

## SECTION 2.

### BONDS OF OFFICIAL DEPOSITARIES OF MONEY.

**§ 479. Liability absolute for money received.** The official bonds of public officers whose duty is to receive, safely keep and faithfully disburse public moneys are of a distinctive character, and will receive first attention. There is a plain line of difference running through the cases upon this subject,

*Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibley*, id. 2489. If a defendant does not pay a penalty which is certain on demand, but forces the plaintiff to a suit, he is subject to damages for its detention. But where the penalty is uncertain, as where treble damages are given, then no damages are allowed for the detention. *North v. Wingate*, Cro. Car. 559; *Sedgwick v. Richardson*, 3 Lev. 374. In an action for a penalty against several, only one penalty can be recovered against all. Although the words are, "that every person offending contrary thereto shall forfeit to the party aggrieved for every offense," etc., yet the meaning is that the penalty shall relate to the offense, and not to the person. *Patridge v. Emson*, Noy, 62. When a penalty is given for a continuous offense, one penalty only can be recovered. *Garret v. Messenger*, L. R. 2 C. P. 583; *Apothecaries Co. v. Burt*, 5 Exch. 363.

When a statute imposes a penalty of forfeiture for an act injurious to the rights of another, and it is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done. Only one penalty can be recovered for doing a prohibitable

or punishable act, as for removing goods from demised premises; and all who assist in the commission of the offense may be sued together. *Conley v. Palmer*, 2 N. Y. 182.

Under the provisions of the New York statute of 1857, to prevent extortion by railroad companies, only one penalty of \$50, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. The forfeiture is not given for the satisfaction of the injury received; that is fully satisfied by a return of the sum extorted, with interest; but it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice. A recovery can be had under this by a party who has paid the excessive fare when riding simply for the purpose of obtaining the penalty. *Fisher v. New York C. & H. R. Co.*, 46 N. Y. 644.

<sup>1</sup> *Carter v. Thorn*, 18 B. Mon. 613.

<sup>2</sup> *Brainard v. Jones*, 18 N. Y. 35; *Wyman v. Robinson*, 73 Me. 384.

<sup>3</sup> *Warner v. Thurlo*, 15 Mass. 154.

resulting from diverse principles which are held to govern the responsibility of such officers. Where the care and custody of public funds are so regulated by law that the specific moneys received are required to be kept and accounted for, the officer is a mere agent or bailee. In other cases no such regulations exist, and the officer is left at liberty to keep the funds according to his discretion; he is required to answer certain calls out of them, and to pay the residue to his successor. In cases of the former class, whatever may be the form of the bond, that is, whether it be general for the faithful performance of official duty, or special, the identical funds officially received belong to the public corporation for which the officer is a depositary or treasurer. And though his responsibility is not wholly regulated by the law of bailments, it is largely so. If governed entirely by that law the funds in his hands would be at the risk of the owner so long as the regulations for their safe keeping are strictly followed; no loss would fall upon him unless it accrued through his fault. But from motives of policy, as well as upon the terms of the statutes and the bonds required, it seems to be settled that all official custodians of money and their sureties are held absolutely bound for its safe keeping, as well as to comply with any special regulations to preserve its identity.<sup>1</sup>

<sup>1</sup> *Muzzy v. Shattuck*, 1 Denio, 233; *Thompson v. Board of Trustees*, 30 Ill. 99; *Hancock v. Hazzard*, 12 Cush. 112; *Ross v. Hatch*, 5 Iowa, 149; *New Providence v. McEachron*, 33 N. J. L. 339; *Supervisors v. Kaime*, 39 Wis. 468.

In *United States v. Prescott*, 3 How. 578, McLean, J., said: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practiced with impunity. A depositary would have nothing more to do than to lay

his plans and arrange his proofs, so as to establish his loss without laches on his part."

In *Ross v. Hatch*, *supra*, the treasurer, from whom the public funds were stolen without his fault, was exonerated because on the terms of the law in Iowa, and of his bond, he was bound only to reasonable diligence.

In *Boyden v. United States*, 13 Wall. 17, it is held that where the law imposes but the duty of a bailee, the officer, by giving the required bond faithfully to discharge the duties of his office, will increase his responsibility to that of an insurer. Strong, J., said: "He would then (as a mere bailee) be bound only to the exercise of ordinary care, even though

Whether the identical money received is required to [21] be kept and paid over so as to create a bailment in the strict sense, as is the case generally under statutes of the United States, or whether it is received with no regulations to preserve its identity, the officer is held to the same absolute rule of liability.<sup>1</sup> In the latter case, however, the authorities

a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract; and *this he does when he binds himself in a penal bond to perform the duties of his office without exception!* There is an established difference between a duty created merely by law, and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything accruing after the contract was made, though unforeseen by the contracting party, and not within his contract, he will not be excused. *Metcalf on Contracts*, 213; *The Harriman*, 9 Wall. 161. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part." See *United States v. Prescott*, 3 How. 578; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*,

9 Wall. 83; *State v. Harper*, 6 Ohio St. 607.

It seems to the writer that if the legal duty is only the due care and fidelity of a bailee, a bond which in terms merely secures the performance of that duty does not increase it. If the bond is required by a statute, and such a condition is prescribed, the two provisions — the one defining the officer's duties, and that prescribing the official bond — would be construed together as requiring the same thing. And if the bond is made, in the absence of a statute, pursuant to some executive regulation, the same rule would apply, for the officer could not require more than the performance of the duty imposed by law. The absolute responsibility is more satisfactorily based on the ground of public policy.

<sup>1</sup>*Commonwealth v. Comly*, 3 Pa. St. 372; *Muzzy v. Shattuck*, 1 Denio, 233; *Hancock v. Hazzard*, 12 Cush. 112; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N.J. L. 339; *State v. Harper*, 6 Ohio St. 607; *United States v. Prescott*, 3 How. 378; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*, 9 Wall. 83; *Board of Justices v. Fennimore*, Cox, 242; *Hayes v. Greer*, 4 Bin. 80; *Hennepin Co. v. Jones*, 18 Minn. 199; *United States v. Watts*, 1 New Mex. 553.

A treasurer who receives interest on public funds is liable therefor on his bond. *Richmond Co. v. Wendel*, 6 Lans. (N. Y.) 33. If the funds were



are not uniform that the officer is not a bailee or agent, though he may not be required to keep and account for the specific funds received; still it is his duty to keep the public funds separate from all others, and to devote them exclusively to the purposes for which he received them; and any deviation from this course is a breach of duty and of his official bond.<sup>1</sup> But in some states such officers are held as debtors for the money paid them; the title to money officially received vests in them personally, and is, therefore, wholly at [22] their risk; they are treated like bankers. They must account for it fairly, and meet all obligations when presented, to the extent of the funds received; then, and only then, is there no default or breach of the condition of their official bond.<sup>2</sup> On the death of such an officer the funds go to his personal representatives;<sup>3</sup> and in no event can they be taken possession of specially by his successor or sued for by the public corporation for whose use the officer held them, in case he lends or otherwise mispends them.<sup>4</sup> These diverse views in

loaned by direction of the proper authorities. *Hunt v. State*, 124 Ind. 306.

In Colorado the state treasurer is absolutely liable for money received by him, but he is not bound to account for interest received on state funds deposited by him in bank, in the absence of a statute to that effect. *People v. Walsen*, 28 Pac. Rep. 1119.

In Kentucky the trustee of the jury fund is not liable for interest received thereon under a statute which imposes on him the duty to pay over moneys received. *Commonwealth v. Godshaw*, 17 S. W. Rep. 737. In accord. *Shelton v. State*, 53 Ind. 331; *Bocard v. State*, 79 Ind. 270; *Snapp v. Commonwealth*, 82 Ky. 173. See *Thouron v. East Tennessee*, etc. R. Co., 18 S. W. Rep. 256; 90 Tenn. 609.

<sup>1</sup> *Supervisors v. Kaime*, 39 Wis. 468; *Freeholders v. Wilson*, 16 N. J. L. 110.

<sup>2</sup> *Perley v. County of Muskegon*, 32 Mich. 132; *Steinback v. State*, 38 Ind. 483; *Rock v. Stinger*, 36 Ind.

346; *Board of Justices v. Fennimore*, Coxe, 242; *Hayes v. Greer*, 4 Bin. 80; *Morbeck v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N. J. L. 339; *Linville v. Leininger*, 72 Ind. 491; *Brown v. State*, 78 id. 239.

<sup>3</sup> *Allen v. State*, 6 Blackf. 252; *Rock v. Stinger*, *supra*.

<sup>4</sup> *Steinback v. State*, *Rock v. Stinger*, *supra*. In *Perley v. County of Muskegon*, *supra*, an action for money had and received was brought by the county for moneys loaned by its treasurer, and it was held it would not lie. Campbell, J., said: "There can be no middle ground between personal and official ownership of moneys. If the moneys used by Martin Perley could be treated as specifically county funds, the liability of parties receiving them would be immediate, and would not depend upon his default. They might have been sued at any time, before as well as after his accounting. . . . In law there can be no difference be-

respect to the nature of such officers' control of the funds in their keeping leads necessarily to divergencies in the apportionment of responsibility between different sets of sureties for the same person holding office for several successive terms.

**§ 480. Adjustment of liability between sets of sureties.**

It is a universal rule that sureties are only liable for the [23] defaults of their principal during the term for which their bond was given, and after it was given, unless it is retrospect-

tween a loan to a banker and a loan to any one else. There is no rule of law which presumes one borrower without security as safer than another. And where, as here, the deposits were promiscuous and from all sources, it would be idle to attempt to attach contract relations with the county to funds which no ingenuity could identify. There is not much difficulty in reaching the personal duty of the treasurer. He is bound to have money to pay liabilities as required, to the full extent of his receipts. And he is bound, when his term ends, to have the balance ready to turn over to his successor. He could not be liable to a civil action if he makes all the payments required by law to be made. He and his sureties are bound on their bond when any such failure occurs. And it appears reasonable that if he has, with any dishonest understanding, put money into the hands of others, which has not been returned, and which it was known could not have come from any other source, and could only have been derived from his office, and must be officially accounted for, and restored, those persons have done an injury for which they should be accountable to those whom they have injured. It may be questionable how far the county could be regarded as directly damnified, if the sureties are responsible or damnified beyond the deficiency in their ability. But there can be no injury where all that is borrowed has been restored. In such a case as the one suggested, the injury consists in destroying to a great extent his power to meet his obligations, and this cannot be done when he is placed again in his former position. As he is the only legal custodian of county funds, no one can be required to do more than to put them in his hands. He has a right to demand them, and he can keep them where he pleases. He is, himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action. But an action based on any such theory must be an action on the case or a bill in equity, and not an action for money had and received. It can never be determined in advance, when money is lent, how far the county will be injured or that it will be injured at all. And the action is not based on the source or identity of the particular funds which have been used. It must depend more on the state of the accounts than upon the identity of the money, and the wrong is much in the nature of a voluntary transfer of property in fraud of creditors, whereby they will be delayed or hindered, and of which the county may justly complain if actually defrauded."

ive in terms; for such contracts cannot be extended by construction.<sup>1</sup> The doctrine is comprehensively stated by Mr. Justice Daniel of the federal supreme court: "This court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have

<sup>1</sup> *United States v. Boyd*, 15 Pet. 187; *Farrar v. United States*, 5 Pet. 373; *Patterson v. Freehold*, 38 N. J. L. 255; *State v. Paul's Ex'r*, 21 Mo. 51; *Myers v. United States*, 1 McLean, 493; *United States v. Spencer*, 2 id. 405; *Jeffers v. Johnson*, 18 N. J. L. 382; *Stone v. Seymour*, 15 Wend. 19; *Bryan v. United States*, 1 Black, 140; *United States v. January*, 7 Cranch, 572; *United States v. Eckford*, 1 How. 250; *United States v. Linn*, 1 How. 104; *Detroit v. Weber*, 29 Mich. 24; *Paw Paw v. Eggleston*, 25 id. 36; *Kingston M. Ins. Co. v. Clarke*, 33 Barb. 196; *Peppin v. Cooper*, 2 B. & A. 431; *Townsend v. Everett*, 4 Ala. 607; *Postmaster v. Norvell*, 1 Gilpin, 126; *Hart v. Guardians of the Poor*, 81\* Pa. St. 466; *County of Mahaska v. Ingalls*, 16 Iowa, 81; *Miller v. Stewart*, 9 Wheat. 681; *Thompson v. Dickerson*, 22 Iowa, 360; *Independent School Dist. v. McDonald*, 39 Iowa, 564; *Bissell v. Saxton*, 67 N. Y. 55; *Vivian v. Otis*, 24 Wis. 518; *Rogers v. State*, 99 Ind. 218.

When the term ends in respect to sureties. See *State v. Wells*, 8 Nev. 105; *Placer v. Dickerson*, 45 Cal. 12; *Welch v. Sumner*, 28 Conn. 390; *Chelmsford Co. v. Demerest*, 7 Gray, 1; *State v. Berry*, 50 Ind. 496; *Riddle v. School District*, 15 Kan. 168; *Wapello v. Bigham*, 10 Iowa, 39;

*People v. Alkenhead*, 5 Cal. 106; *Mayor v. Horn*, 2 Har. (Del.) 190; *Rany v. Governor*, 4 Blackf. 2; *State v. Bird*, 2 Rich. 99; *Milliken v. State*, 7 Blackf. 77; *Tuly v. State*, 1 Ind. 500; *Bigelow v. Bridge*, 8 Mass. 275; *Commissioners v. Greenwood*, 1 Desaus. 450; *South Carolina Society v. Johnson*, 1 McCord, 41; *South Carolina Ins. Co. v. Smith*, 2 Hill (S. C.), 589; *Commonwealth v. Fairfax*, 4 Hen. & M. 208; *Governor v. Cobb*, 2 Dev. 489; *Atkins v. Baily*, 9 Yerg. 111; *State v. Lackey*, 3 Ired. (N. C.) 25; *Williams v. Miller, Kirby*, 189; *State v. Crooks*, 7 Ohio, 573; *Munford v. Rice*, 6 Munf. 81; *Hughes v. Smith*, 5 Johns. 168; *Supervisors v. Kaime*, 39 Wis. 468; *Winneshiek Co. v. Maynard*, 44 Iowa, 15; *Middleton v. Colwell*, 4 Bush. 392; *Newman v. Metcalf*, 4 Bush. 67; *United States v. Cheeseman*, 3 Sawyer, 424.

An antedated bond does not bind the sureties for the period preceding the date of the delivery, if its language is not retrospective. *Hyatt v. Grover & B. S. M. Co.*, 41 Mich. 225.

Sureties are liable for their principal's term, and for such further time as is reasonably sufficient for the election and qualification of his successor. *Supervisors v. Kaime*, 39 Wis. 468; *Rahway v. Crowell*, 40 N. J. L. 207.

made themselves answerable.”<sup>1</sup> Where an officer is his own successor his sureties for either term are bound for him and should be held liable precisely as though the principal had succeeded some other person instead of being his own successor. Each set is required to account for all the public [25] money that came to his hands during their term.<sup>2</sup>

If the officer on the expiration of a term must turn over the funds with which he is charged to a successor, who is a different person, actual payment is required; if made, the sureties for the expired term are thus exonerated; if not made, the deficiency is at once manifest, and there is a breach of the bond. Payment discharges the debt of the late incumbent if he held the funds as a debtor or banker; or fulfills the trust and performs the contract if he held them as agent or bailee. In either case the actual payment or the necessity of such payment prevents any uncertainty or confusion. The same result may be attained where the successor is the same person, if there is an actual identification and appropriation of funds to the amount charged, or a deficiency ascertained by an official settlement; but otherwise, the debt, which the state of the accounts for the earlier term shows, will not be satisfied, or be the subject of a default, until actual payment is subsequently called for. The theory that the officer is a debtor instead of a bailee postpones, in such a case, the exoneration of the sureties, and apparently extends the period of their responsibility. But if the officer is a mere bailee their exoneration depends solely on the fact whether the public funds are in hand at the expiration of their term; and the liability of the sureties for the next term depends on the same fact.<sup>3</sup>

<sup>1</sup> *Jones v. United States*, 7 How. 109; *Freeholders v. Wilson*, 16 N. J. 681; *Smith v. Paul's Ex'rs*, 21 Mo. L. 110; 51; *Draffin v. Boonville*, 8 Mo. 395; <sup>3</sup> *United States v. Boyd*, 15 Pet. 187; *Todd v. Boon Co.*, id. 431; *State v. Broome v. United States*, 15 How. 143; *Beyerle v. Hain*, 61 Pa. St. 226; *Smith*, 26 Mo. 226; *Drury v. Drury*, 36 Mo. 281; *State v. Atherton*, 40 Mo. 209; *Welch v. Seymour*, 18 Conn. 387; *Rochester v. Randall*, 105 Mass. 295; *United States v. Eckford's Ex'r*, 1 How. 250; *Thompson v. Dickerson*, 22 Iowa, 360; *Commonwealth v. Reitzel*, 9 W. & S. 109; *Independent*

<sup>2</sup> *Detroit v. Weber*, 29 Mich. 24; *School Dist. v. McDonald*, 39 Iowa, 564; *Creswell v. Nesbitt*, 16 Ohio St.



Where a treasurer holds his office for several consecutive terms, and is found to be a defaulter at the end of his last term, it has been presumed, in the absence of proof to the contrary, that the entire default occurred in such term.<sup>1</sup> The [26] sureties in the last bond, when a final settlement is made, are *prima facie* liable for the amount thus shown to be in his hands. To render the sureties in a former bond liable it must be established that the money was converted during the period covered by their bond.<sup>2</sup>

§ 481. **The same subject.** If the officer owns the funds which come into his hands officially his sureties are bound until he has paid the debt arising from such receipt. Although the identical funds so received may be in his hands at the expiration of his term, and at the beginning of the term next succeeding in which he is his own successor, still, unless they are in some way identified as public funds in the latter term so that the sureties for that term become responsible for so much received then by the principal, the sureties for the former term must continue to be liable until the money is actually paid according to law.<sup>3</sup> On the other hand, if the officer is

35; *Street v. Laurens*, 5 Rich. Eq. 227. See *Overacre v. Garrett*, 5 Lans. 156.

<sup>1</sup> *Kelly v. State*, 25 Ohio St. 567; *Hetten v. Lane*, 43 Tex. 279.

<sup>2</sup> *State v. Paul's Ex'r*, 21 Mo. 51; *State v. Smith*, 26 Mo. 226; *Alvord v. United States*, 13 Blatchf. 279; *Readfield v. Shaver*, 50 Me. 36; *Bruce v. United States*, 17 How. 437, 443; *St. Joseph v. Merlatt*, 26 Mo. 233; *Morley v. Metamora*, 78 Ill. 394; *Snaggs v. Stone*, 7 Jones' L. 382. See *Miller v. County of Macoupin*, 7 Ill. 50; *Coons v. People*, 76 Ill. 383; *Hetten v. Lane*, 43 Tex. 279.

<sup>3</sup> In *Goodwine v. State*, 81 Ind. 109, at the close of the officer's first term he was chargeable with money which was invested in his private business; during his second term he made up the amount; at its close he failed to pay his successor all that was due. The suit was against the sureties on

his second bond, who insisted that the defalcation occurred during the first term. The court said that the officer became a defaulter in his first term, not because he invested money received from public sources in his private business, for that he had a right to do so long as he kept himself ready to pay out according to law all sums required for public use; but because, at the end of his term, he did not have in his hands to turn over to his successor (himself) the amount for which he was then accountable. And had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good. By the sale of his property he obtained money and replaced that for which he was in default, and when he did this the appellants (sureties on the second bond) became liable therefor,

required to hold the specific funds which he receives, or if he is merely agent of the public, so that all his acts in the management of the public funds are official, whatever changes they undergo in his possession, his liability ceases on the expiration of his term, if at that time none of them have been misapplied.

This difference in the principle of their liability is further illustrated by the decisions relative to the appropriation of payments made by the officer. On the principle that he owes a debt to the extent of his official receipts, and that the title to the public funds vests in him personally, all the payments he makes must be deemed to be made out of his own funds whether derived from public or private sources. Therefore, he would have a right, if he chose, to apply all the moneys which came to him in one term to satisfy defalcations in another.<sup>1</sup> But if the officer is a mere trustee, having charge of and administering the funds of the public, of which he [27] is the servant, he has no option to apply funds collected subsequently to the execution of the second bond to the discharge of the first, when the sureties are different.<sup>2</sup> Neither

as much as if another had been his predecessor in the office, and that other had been in like default and had afterwards made it good by payment to his successor of the amount due.

<sup>1</sup> Colerain v. Bell, 9 Met. 499. The principle of this decision was approved and made the basis of the judgment in Hancock v. Hazzard, 12 Cush. 112. See Steinback v. State, 38 Ind. 483; also Chapman v. Commonwealth, 25 Gratt. 721; Sandwich v. Fish, 2 Gray, 298; Cook v. State, 13 Ind. 154; State v. Smith, 26 Mo. 226; Wilson v. Burfoot, 2 Gratt. 134; Lyndon v. Miller, 36 Vt. 329; Seymour v. Van Slyck, 8 Wend. 403.

<sup>2</sup> United States v. January, 7 Cranch, 570; Jones v. United States, 7 How. 681; United States v. Eckford's Ex'r, 1 How. 250; Myers v. United States, 1 McLean, 493; United States v. Boyd, 15 Pet. 208; Farrar

v. United States, 5 Pet. 373; County of Mahaska v. Ingalls, 16 Iowa, 81; Bessinger v. Dickerson, 20 id. 260; Warren County v. Ward, 21 id. 85; Readfield v. Shaver, 50 Me. 36; Thompson v. Dickerson, 22 Iowa, 360; Paw Paw v. Eggleston, 25 Mich. 36; Porter v. Stanley, 47 Me. 515; Mann v. Yazoo, 31 Miss. 574; Stone v. Lyman, 15 Wend. 19; Paducah v. Cully, 9 Bush, 323; State v. Smith, 26 Mo. 226; Newcomer v. State, 77 Texas, 286.

In Miller v. County of Macoupin, 7 Ill. 50, a school commissioner held office from 1834 to 1839 without any new appointment, being annually required to give, and giving, with fresh sureties, a new official bond. He received money every year. On going out of office in 1839 he had not legally disbursed any portion of the school fund, nor did he pay over any to his successor. The county

is such right vested in the officers to whom the defaulting official makes payments. The law regulates their duties, and they cannot, by any exercise of discretion, enlarge or restrict the obligations assumed in the bond of another officer, or by keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties thereon.<sup>1</sup> It is a general rule that, where the law requires an officer to perform a duty which is special in its nature and provides for a

sued the bond for 1837. It was held that the sureties were liable for the moneys in his hands during the year 1837. Scates, J., delivering the opinion, said the case was distinguished from the cases where the same person holds the same office for several terms as successor to himself. "Here," he says, "was no reappointment, but a continuing term of office, with annual bonds conditioned for the faithful performance of the duties required or thereafter to be required by law. It was the duty of the commissioner by law to loan all moneys in his hands belonging to the county and several townships, and keep the same at interest, except such sums as might be directed by law to be disbursed from time to time. Now, he neither loaned, disbursed nor paid over to his successor any portion of these funds. He only brought forward and stated them in account from year to year. Thus, by including all previous receipts in the statement of each year's account, he showed the whole amount in his hands. But surely, no one can rationally contend that this is a payment. He was not reappointed annually; he did not succeed himself; it was but one term of office from 1834 to 1839. It might as reasonably be contended that one in default, having received a new appointment, by including the amount in default

in stating an account, thereby paid it. Such a position is not sustained by law, reason or justice. Not having, therefore, made loans, disbursements or payments to his successor of any portion of the money received during the year 1837, the sureties are still liable to account for that sum." *Postmaster-General v. Munger*, 2 Paine C. C. 189; *Poole v. Cox*, 9 Ired. 69; *Holeran v. School District*, 10 Neb. 406.

<sup>1</sup> *United States v. Eckford's Ex'r*, 7 How. 688; *State v. Middleton's Sureties*, 57 Texas, 185; *Newcomer v. State*, 77 id. 286; *Boring v. Williams*, 17 Ala. 510.

A treasurer who succeeded himself was a defaulter at the end of each of his two terms. Subsequently payments were made without any application thereof by any one. The funds paid were derived from loans and investments of the moneys for which he was in default, and also from sources having no connection with such moneys. The bonds for each term were equally good. In a suit on the earlier bond the payments were applied thus: the funds derived from the public money were applied to the term from the moneys of which the loans and investments were made, and those realized from other sources to the defalcation of the first term. *Rogers v. State*, 99 Ind. 218.



special bond for its faithful discharge, the sureties on such bond are solely liable for default in connection with those duties, in the absence of any declaration in the statute that liability shall attach to those who have signed the general bond.<sup>1</sup> Where the sureties were liable for one fund which came to the treasurer's hands but were not liable for another, and he had intermingled the two, the aggregate default being known and the total amount of both funds, and of the fund for which they were not responsible, it was held that a *pro rata* of the loss was chargeable to each fund, and that the sureties were liable for the proportional loss of that for which they were responsible.<sup>2</sup>

§ 482. **Neglect of duty by other officers.** Official [28] bonds are construed, as has been shown, as requiring the custodians of public moneys to safely keep and administer them. This duty is absolute, and the funds are wholly at the risk of the officer to whose keeping they are committed. His sureties are bound not only for the safety of the money, as against losses by fire, theft or robbery, but also from the fault or wrong of the officer himself. Laws requiring that official examinations of his accounts at short and stated, or at irregular, periods shall be made, are no part of the contract with the sureties. Such provisions are enacted for further security and protection of the public, and are not intended for their benefit.<sup>3</sup> Such regulations may even impose the duty of active measures on the discovery of any defalcation for dismissal of the officer, or the recovery of moneys misapplied; but they are held directory, and, if not complied with, the omission is

<sup>1</sup> *Milwaukee Co. v. Ehlers*, 45 Wis. 281; *Crumpler v. Governor*, 1 Dev. 52; *Governor v. Barr*, id. 65; *Waters v. State*, 1 Gill, 302; *Commonwealth v. Toms*, 45 Pa. St. 408; *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 4 Ill. 123; *State v. Johnson*, 55 Mo. 80; *United States v. Cheeseman*, 3 Sawyer, 424; *State v. Young*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Met. 317; *Williams v. Morton*, 38 Me. 52.

<sup>2</sup> *Britton v. Fort Worth*, 78 Texas. 227.

<sup>3</sup> *Commonwealth v. Tate*, 89 Ky. 587; 13 S. W. Rep. 113; *Hart v. United States*, 95 U. S. 316; *Christian*, Ex parte, 23 Ark. 641; *Christian v. Ashley Co.*, 24 id. 142; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Van Zandt*, 11 id. 184; *United States v. Nicholl*, 12 id. 505; *People v. Jenkins*, 17 Cal. 500.



no defense to an action against the sureties.<sup>1</sup> The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches be applied to its transactions.<sup>2</sup>

Neither the neglect of one public servant to perform his duties, nor his malfeasance in office,<sup>3</sup> can be set up as a reason why the sureties of another should be released from responsibility for the misconduct of their own principal, in no way caused by that neglect, and only made public later than it would have been if there had been no neglect or malfeasance.<sup>4</sup> The same doctrine has been applied in actions against sureties of agents and officers of private corporations.<sup>5</sup>

### SECTION 3.

#### OTHER OFFICIAL BONDS.

§ 483. **Scope of section.** Many of the cases considered in writing this section were brought against officers alone, their sureties not being parties. The principles underlying the adjudications illustrate the extent of and the limitations upon the liability of sureties. The liability of officers for affirmative wrong-doing is considered in the chapters which treat of trespass, conversion and related topics.

§ 484. **Right of action against officers.** An individual who sustains special injury by the non-feasance of a public ministerial officer, or an officer who acts in a ministerial ca-

<sup>1</sup> *Id.*

<sup>2</sup> *United States v. Kirkpatrick*, *supra*.

<sup>3</sup> *Waseca Co. v. Sheehan*, 42 Minn. 57; *Supervisors v. Otis*, 62 N. Y. 88.

<sup>4</sup> *People v. Foster*, 133 Ill. 496; 23 N. E. Rep. 615; *Commonwealth v. Tate*, 89 Ky. 587; 13 S. W. Rep. 113; *Jones v. United States*, 18 Wall. 662; *Detroit v. Weber*, 26 Mich. 184; *Paducah v. Cully*, 9 Bush, 323; *Ex parte Christian*, 23 Ark. 641; *Christian v. Ashley Co.*, 24 Ark. 142; *People v. Russell*, 4 Wend. 570; *People v.*

*Foote*, 19 Johns. 58. The doctrine of *People v. Jansen*, 7 Johns. 332, is overruled by *Supervisors v. Otis*, 62 N. Y. 88.

<sup>5</sup> *State v. Atherton*, 40 Mo. 209; *Minor v. Mechanics' Bank*, 1 Pet. 46; *State Bank v. Locke*, 4 Dev. 529; *Amherst Bank v. Root*, 2 Met. 522; *Morris Canal & B. Co. v. Van Vorst*, 21 N. J. L. 100. See *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sander-son v. Ashton*, L. R. 8 Exch. 73.

capacity, has a right of action against him,<sup>1</sup> regardless of whether the officer was influenced by malice.<sup>2</sup> If the act or omission complained of is made the basis of an action against the sureties on the bond of the officer, it must be in regard to a matter of duty imposed upon him by law;<sup>3</sup> and whether against him alone or also against his sureties must not have been directed or caused by the party who seeks redress for it.<sup>4</sup> Such right of action is not affected by the imposition of a statutory penalty for the neglect of duty. "In cases where the public have an interest in the faithful discharge of official duty the penalty for neglect, unless the contrary appear, is for the protection of that interest, rather than to secure private rights; and in many cases the forfeiture is entirely inadequate for the latter purpose, and is not even available to the injured party."<sup>5</sup> The penalty is an additional remedy.<sup>6</sup> Damages which result from the failure to properly perform official duty at the instance of a citizen and which the law requires the officer to perform for a consideration moving from him who asks its performance flow not from the violation of a general duty but from the breach of a special obligation, and arise *ex contractu*.<sup>7</sup> Hence while a recorder of deeds is liable in damages for a false certificate of search for liens upon property, his liability is limited to the party who asks and pays for the certificate; it does not extend to that party's assigns or alienees.<sup>8</sup>

§ 485. **Construction of bonds.** There is no dissent from the principle that, so far as the liabilities of sureties are concerned, the bonds of public officers are *strictissimi juris*, and cannot be extended by construction or enlarged by the acts of others. A distinction is taken, however, between such obligations and

<sup>1</sup> Robinson v. Chamberlain, 34 N. Y. 389; Adsit v. Brady, 4 Hill, 630; West v. Brockport, 16 N. Y. 168; Hover v. Barkhoof, 44 id. 113; Farrant v. Barnes, 11 C. B. (N. S.) 655; Nowell v. Wright, 3 Allen, 166; Wall v. Trumbull, 16 Mich. 235.

<sup>2</sup> Brasyear v. Maclean, 33 L. T. (N. S.) 1; Brewer v. Watson, 65 Ala. 88; S. C., 71 id. 299.

<sup>3</sup> Moore v. Pye, 10 Kan. 247; Kahl v. Love, 37 N. J. L. 5.

<sup>4</sup> Thompson v. Goding, 63 Me. 425.

<sup>5</sup> Hayes v. Porter, 22 Me. 371, 376; Beckford v. Hood, 7 T. R. 620.

<sup>6</sup> Farmers' T. Co. v. Coventry, 10 Johns. 389.

<sup>7</sup> Brigham v. Bussey, 26 La. Ann. 676; Brown v. Penn, 1 McGloin (La.), 265.

<sup>8</sup> Commonwealth v. Kellogg, 6 Phila. 90; Houseman v. Girard B. & L. Ass'n, 81 Pa. St. 256.

those which are wholly between individuals. The former are to be read as though the statutes defining the duties of the officers for whose acts the sureties therein become responsible are embodied in them,<sup>1</sup> and also as if they expressly recognized the power of the legislature to add to or diminish the duties connected with the office.<sup>2</sup> This power is not absolute, except so far as the added duties are of the same kind and nature as those previously required of the officer. The collection of license and docket fees from attorneys cannot be added to the duties of the clerk of a court so as to charge his sureties whose obligation was previously assumed with responsibility therefor.<sup>3</sup> In California it has been ruled that it is not competent for the legislature to extend the term of office of a county treasurer whose bond was for two years and until the election and qualification of his successor, and make his sureties liable for his acts beyond the time stipulated in the bond.<sup>4</sup> There is a conflict of authority as to the effect upon sureties of a statute extending the time for the collection of taxes by the collector and the settlement of his accounts. In Illinois, Tennessee and Missouri the passage of such an act, after the execution of the bond, and without the sureties' consent, relieves them.<sup>5</sup> This is denied in Mississippi, Virginia, Maryland and North Carolina.<sup>6</sup>

**§ 486. Mode of redress for official dereliction.** The chief object of other official bonds than those of fiscal officers is to provide additional security for the faithful performance of official duties at the instance or for the benefit of private individuals. And in some form the persons who suffer injury by the neglect or misconduct of the officer may severally resort to the bond by independent proceedings for redress in damages. In some states the judgment is given for the penalty once for all; the party for whose benefit the action is in-

<sup>1</sup> *Olean v. King*, 119 N. Y. 355; *People v. Pennock*, 60 id. 426; *State v. Davis*, 96 Ind. 539; *Dawson v. State*, 38 Ohio St. 1.

<sup>2</sup> *People v. Vilas*, 36 N. Y. 459.

<sup>3</sup> *Denio v. State*, 60 Miss. 949; *Brown v. Sneed*, 77 Texas, 471.

<sup>4</sup> *Brown v. Lattimore*, 17 Cal. 93.

<sup>5</sup> *Davis v. People*, 6 Ill. 409; *People*

*v. McHatton*, 7 id. 638; *Johnson v. Harker*, 8 Heisk. 388; *State v. Roberts*, 68 Mo. 234.

<sup>6</sup> *State v. Swinney*, 60 Miss. 39; *Commonwealth v. Holmes*, 25 Gratt. 771; *Smith v. Commonwealth*, id. 780; *State v. Carleton*, 1 Gill, 249; *Prairie v. Worth*, 78 N. C. 169.

stituted assigns such breaches as have affected him, and damages are assessed thereon and collected for his benefit; other breaches may be afterwards assigned by him and by others who have cause to complain until the aggregate recoveries equal the penalty.<sup>1</sup> In other jurisdictions judgment may be recovered in each individual case for the penalty to be discharged by payment or collection of special damages assessed on the breaches assigned.<sup>2</sup> And in others the judgment [30] is rendered directly for the damages awarded for breach of the condition; and to some extent by summary proceedings on motion.<sup>3</sup> The person who first sues and obtains judgment is entitled to the whole penalty, if his demand amount to so much, in exclusion of other claimants.<sup>4</sup> And the same rule holds, though the party who first sues is prevented from obtaining judgment by a stay of proceedings, on the defendants paying into court the penalty of the bond.<sup>5</sup> And where, after

<sup>1</sup> *People v. Birdsall*, 20 Johns. 297; *People v. Mathewson*, id. 300; *Richardson v. Smith*, 2 Jones' L. 8; *Mitchell v. Laurens*, 7 Rich. 109; *Ridener v. Rogers*, 6 B. Mon. 594; *Skinner v. Phillips*, 4 Mass. 68; *McGuire v. Justices*, 7 B. Mon. 340; *Fuller v. Holmes*, 1 Aik. 111; *Rodes v. Commonwealth*, 6 B. Mon. 359; *Hartz v. Commonwealth*, 1 Grant (Pa.), 359; *Jackson v. Rundlet*, 1 Wood. & M. 381; *Eason v. Sutton*, 4 Dev. & Batt. 484; *Gibson v. Martin*, 7 Humph. 127; *Wells v. Commonwealth*, 8 B. Mon. 459; *Trice v. Turrentine*, 13 Ired. 212; *Norton v. Mulligan*, 4 Strobb. 355; *Gwin v. Barton*, 6 How. (U. S.) 7; *Stephens v. Crawford*, 3 Ga. 499; *Harrison v. Brown*, 1 Swan (Tenn.), 272; *Wilson v. Cantrell*, 19 Ala. 642; *State v. McAlpin*, 6 Ired. 347; *Sheppard v. State*, 3 Gill, 289; *White v. Wilkins*, 24 Me. 299; *Commonwealth v. Straub*, 35 Pa. St. 137; *Lynch v. Commonwealth*, 16 S. & R. 368; *Campbell v. Commonwealth*, 8 id. 414; *People v. Holmes*, 2 Wend. 281; *Lawton v. Erwin*, 9 id. 233; *Treasurers v. Ross*, 4 McCord, 273; *Hernandez v. Mont-*

*gomery*, 14 Martin, 422. But see *Hatch v. Attleborough*, 97 Mass. 533.

<sup>2</sup> *Sangster v. Commonwealth*, 17 Gratt. 124; *Skinner v. Phillips*, 4 Mass. 68.

When a private person brings a suit against a United States marshal and the sureties on his bond for official default, the judgment should be, under sections 784, 785, Revised Statutes of United States, not for the penalty but for the plaintiff's damages. *Hagood v. Blythe*, 37 Fed. Rep. 249.

<sup>3</sup> *Wolverton v. Commonwealth*, 7 S. & R. 273; *Withrow v. Commonwealth*, 10 id. 231; *Adler v. Newcomb*, 2 Dill. C. C. 45; *Hendricks v. Shoemaker*, 3 Gratt. 197; *Tyree v. Donnelly*, 9 id. 64; *Graham v. Chandler*, 12 Ala. 829; *Camp v. Watt*, 14 id. 614; *Collier v. Powell*, 23 id. 579; *McCrosky v. Riggs*, 12 S. & M. 712; *Young v. Hare*, 11 Humph. 303.

<sup>4</sup> *Dallas v. Chaloner*, 3 Dall. 501, note; 4 id. 106, note; *Christman v. Commonwealth*, 17 S. & R. 381; *Glidewell v. McGaughey*, 2 Blackf. 357.

<sup>5</sup> *McKean v. Shannon*, 1 Bin. 370.



one suit on such bond, several sue on it at the same term, the surplus will be divided among them *pro rata*; but if, instead of suing, they apply to the court to come in under the first suit, he who first applies will be entitled to priority of payment.<sup>1</sup> Such bonds are given for the benefit of all persons who may be aggrieved by the negligence or misconduct of the officer; and no individual can receive voluntary payment of the amount of it, and no payment to an individual will exonerate the obligor. Faithfully accounting for moneys to the amount of the penalty will not satisfy an official bond. It will stand good for losses and defalcations to that amount. For this reason it is unnecessary, in a declaration upon such a bond, to aver the non-payment of the penalty.<sup>2</sup>

§ 487. **What private injuries covered by official bonds.** In such actions damages may be recovered by any person suffering injury from neglect to perform or negligent performance of official acts which he had a right to require and have performed for his private benefit;<sup>3</sup> or from torts committed by [31] virtue or under color of office, and which are specially

See *State v. Wayman*, 2 Gill & J. 254. Compare *State v. Ford*, 5 Blackf. 393.

<sup>1</sup> *McKean v. Shannon*, 1 Bin. 370.

<sup>2</sup> *State v. McClane*, 2 Blackf. 192; *Potter v. Titcomb*, 7 Me. 319; *Commonwealth v. Montgomery*, 31 Pa. St. 519.

<sup>3</sup> *State v. Wall*, 9 Ired. 20; *State v. Johnson*, 7 id. 77; *Wyche v. Myrick*, 14 Ga. 584; *Treasurers v. Ross*, 4 McCord, 273; *Rowland v. Wood*, 4 Dana, 194.

The sureties on a sheriff's bond are not liable to a printer for advertising notices, rules, audits, inquisitions and sales ordered by the sheriff, though it was part of his official duty to cause such advertisements to be made, and for neglect of which they would have been responsible. The duty to pay in such case is not official. *Commonwealth v. Swope*, 45 Pa. St. 535; *Allen v. Ramey*, 4 Strobb. 30; *Crocker v. Fales*, 13

Mass. 260; *Wilson v. State*, 13 Ind. 341; *Brown v. Phipps*, 6 Sm. & M. 51.

Where the rule prevails that the record of any instrument which is entitled to be recorded is only notice of the existence and record of the thing itself and not of the original, a mistake in recording a deed containing the grantee's contract to assume and pay \$500 as a part of the mortgage debt on the land conveyed, by which the record shows the assumption of only \$200 of such debt, renders sureties on the officer's bond liable for the damages resulting to the grantor in the deed by reason of such mistake. *State v. Davis*, 96 Ind. 539. Their liability does not extend beyond nominal damages unless there is proof that the plaintiff cannot collect the full amount due from the person who assumed the payment of the lien. *State v. Davis*, 117 Ind. 307.

injurious to him.<sup>1</sup> The sureties of a sheriff are liable for money collected by him under color of his office, although the writ may have been erroneous or illegal.<sup>2</sup> But it has been held that money received by a sheriff on account of an execution after the return day is not officially received, and a failure to pay it over is not a breach of his official bond.<sup>3</sup> So, where a defendant in an execution paid to the sheriff the amount thereof in depreciated currency, adding a sum to make it equal to par, and the plaintiff in the execution refused to receive it, so that the defendant was compelled to pay the

<sup>1</sup>But it has been repeatedly held that where a sheriff, or like officer, with process authorizing a seizure of A.'s property, takes B.'s, the latter may recover damages therefor upon such officer's official bond. *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Gratt. 124; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Carmack v. Commonwealth*, 5 Bin. 184; *Skinner v. Phillips*, 4 Mass. 68; *Schloss v. White*, 16 Cal. 65; *Halliman v. Carroll*, 27 Tex. 23; *Commonwealth v. Stockton*, 5 Monroe. 192; *Forsythe v. Ellis*, 4 J. J. Marsh. 299; *People v. Schuyler*, 4 N. Y. 173, reversing S. C., 5 Barb. 156, and overruling *Ex parte Reed*, 4 Hill, 572; *Van Pelt v. Little*, 14 Cal. 194; *Tracy v. Goodwin*, 5 Allen, 409; *Dennison v. Plumb*, 18 Barb. 89; *State v. Moore*, 19 Mo. 369; *State v. Farmer*, 21 Mo. 160; *McElthaney v. Gilliland*, 30 Ala. 183; *Commonwealth v. Williams*, 4 Litt. 335; *Brunott v. McKee*, 6 W. & S. 513; *Gilbert v. Isham*, 16 Conn. 525; *Strunk v. Ocheltree*, 11 Iowa, 158; *Charles v. Haskins*, id. 329; *Greenfield v. Wilson*, 13 Gray, 384; *Dane v. Gilman*, 49 Me. 173. Compare *State v. Brown*, 11 Ired. 141, and *State v. Conover*, 28 N. J. L. 224; also *Taylor v. Parker*, 43 Wis. 78; *Cairnes v. O'Brien*, 40 id. 470; *Gerber v. Ackley*, 37 id. 43; *State v. Mann*, 21 id. 684.

A statute making carriers liable for the death of any person caused by their negligence or carelessness "or by the unfitness or gross negligence or carelessness of their servants or agents," and which, in a subsequent section, imposes such liability "when the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another," does not make the sureties on the bond of a sheriff responsible for the act of a deputy-sheriff in wrongfully killing a prisoner who was attempting to escape. *Hendrick v. Walton*, 69 Texas, 192.

Under a bond conditioned for the faithful performance of duty as well with respect to all persons concerned as the state, the wrongful entry of the cancellation of a mortgage gives a right of action to a purchaser of the mortgaged premises who searched the registry and found such entry therein and relied upon it, although he did not employ the officer who made it to make a search of the record. *Appleby v. State*, 45 N. J. L. 161.

<sup>2</sup>*Rollins v. State*, 13 Mo. 437; *Treasurers v. Buckner*, 2 McMull. 32.

<sup>3</sup>*Dean v. Governor*, 13 Ala. 526; *Fitzpatrick v. Branch Bank*, 14 Ala. 533; *Commonwealth v. Cole*, 7 B. Mon. 250; *Radford v. Hull*, 30 Miss. 712.

amount in other funds; and the sheriff, on demand, failed to repay him the depreciated funds, it was held that the sheriff and his sureties were not liable therefor on his official bond, [32] although the sheriff would be individually liable.<sup>1</sup> Money paid a sheriff by consent of the parties to a sale made by him, though received in advance of the time fixed by the order of sale for its payment, is presumed to have been received by him in his official capacity.<sup>2</sup> Without giving any reasons for doing so it has been ruled in Indiana that if a note is received by a justice of the peace in his official capacity and he collects it without issuing process or rendering judgment, and appropriates the proceeds to his own use, the sureties on his bond are liable.<sup>3</sup> An action will not lie on an officer's bond, given for the faithful performance of the duties of his office, for an act which is beyond the scope of his authority, although done under color of his office.<sup>4</sup> Where a sheriff sold property taken on attachment, by agreement between the plaintiff and defendant, and without an order of court, it was held that his sureties could not be made liable on the bond for his failure to pay over the money.<sup>5</sup> The bond of a clerk of court was conditioned for the faithful performance of the duties required of him by law; but it was held not a part of his duty to collect the fees of other officers of the court, and that he could not be held liable on his bond for not paying over such fees if he had received any.<sup>6</sup> And where a party arrested gave bail, which was objected to for insufficiency, and to obviate the objection made a deposit of money with the sheriff, it was held his sureties were not liable for it.<sup>7</sup> If an act done by an officer under color of authority is in part in excess of

<sup>1</sup> *Brown v. Mosely*, 11 S. & M. 354.

<sup>6</sup> *Matthews v. Montgomery*, 25 Miss.

<sup>2</sup> *State v. Cayce*, 85 Mo. 456.

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<sup>3</sup> *Widener v. State*, 45 Ind. 244. See *Bosley v. Smith*, stated in fourth note below.

<sup>7</sup> *State v. Long*, 8 Ind. 415. See *Beals v. Commonwealth*, 7 Watts, 183; *Bosley v. Smith*, 3 Humph.

<sup>4</sup> *Barnes v. Whitaker*, 45 Wis. 204; *Taylor v. Parker*, 43 id. 78; *People v. Foster*, 133 Ill. 496; 23 N. E. Rep. 615; *State v. McDonough*, 9 Mo. App. 63; *Kerr v. Brandon*, 84 N. C. 128; *Furlong v. State*, 58 Miss. 717; *People v. Gardner*, 55 Cal. 304.

*Governor v. Pearce*, 31 Ala. 465; *State v. White*, 10 Rich. L. 442; *Webb v. Anspach*, 3 Ohio St. 522; *State v. Rollins*, 29 Mo. 267; *Mills v. Allen*, 7 Jones' Law, 564; *Hinckler v. County Court*, 27 Ill. 39; *Boston v. Moore*, 3

<sup>5</sup> *Governor v. Perrine*, 53 Ala. 807.

his power and in part within it the sureties on his bond will be liable for the latter part.<sup>1</sup>

§ 488. **Measure of damages against sureties.** The measure of damages for which the sureties on official bonds are bound, in the absence of any statutory rule, is just compensation for the injury actually sustained,<sup>2</sup> in addition to nominal damages which follow the breach of such bonds. Sureties are not subject to exemplary damages as a rule, nor to penalties [33] imposed by statute upon their principal.<sup>3</sup> The natural and proximate consequence of the wrongful entry of the cancellation of a mortgage to the purchaser of the premises affected

Allen, 123; Brooks v. Gibbs, 2 Jones' Law, 326; Smith v. Berry, 37 Me. 298; Hardin v. Carico, 3 Met. (Ky.) 289.

A constable gave a bond conditioned "well and truly to demean himself in office." Held, that he and his sureties were responsible on such bond for a failure to pay over money collected as constable and retained by him though the collection was made without process. Bosley v. Smith, 3 Humph. 406.

<sup>1</sup> Kendall v. Allshire, 28 Neb. 707.

<sup>2</sup> Sheldon v. Upham, 14 R. I. 493; Boyd v. Desmond, 79 Cal. 250; Ivey v. Colquitt, 63 Ga. 509; Commonwealth v. Harmer, 6 Phila. 90; Brobst v. Skillen, 16 Ohio St. 382; Hill v. Lowry, Tappan (Ohio), 149; State v. Lawson, 2 Gill, 62; State v. Johnson, 7 Ired. 77; State v. Watson, id. 289; Sedam v. Taylor, 3 McLean, 547; Crawford v. Andrews, 6 Ga. 244; Ziegler v. Commonwealth, 12 Pa. St. 227; Bevans v. Ramsey, 15 How. (U. S.) 179; Karch v. Commonwealth, 3 Pa. St. 269; Brooks v. Governor, 17 Ala. 206; Wyche v. Myrick, 14 Ga. 584; Taylor v. Johnson, 17 Ga. 521; Dobbs v. Justices, 17 Ga. 624; Chapman v. Smith, 16 How. (U. S.) 114; Reed v. Goettie, 7 Rich. 126; Carpenter v. Doody, 1 Hilt. 465; State v. Atkinson, 17 Ind. 26; Governor v.

Evans, 1 Dev. & Bat. 243; Governor v. Matlock, 1 Hawks, 425; Treasurers v. Clowney, 2 McMull. 510; Anderson v. Joliet, 14 La. Ann. 114; Bennett v. Vingard, 34 Mo. 216; Lowell v. Parker, 10 Met. 309; Commonwealth v. Allen, 30 Pa. St. 49; Findley v. Hutzell, 29 id. 337; Perkins v. Giles, 9 Leigh, 397; Griffin v. Underwood, 16 Ohio St. 389; Commonwealth v. Bradley, 1 Litt. 48; Commonwealth v. Sayres, 1 Miles, 235; United States v. Moore, 2 Brock. 317. See Crawford v. Ward, 7 Ga. 445.

In assessing damages on a sheriff's bond in Arkansas for breach in not returning an execution, interest will not be computed on the aggregate of the debt and interest in the execution. Norris v. State, 22 Ark. 524; Henry v. Ward, 4 Ark. 151. See Gibson v. Governor, 11 Leigh, 600.

<sup>3</sup> Glascock v. Ashman, 52 Cal. 493; Boyd v. Desmond, 79 id. 250; Brooks v. Governor, 17 Ala. 806; Wyche v. Myrick, 14 Ga. 584; McDowell v. Burwell, 4 Rand. 317; Fletcher v. Chapman, 2 Leigh, 565; Lawson v. Pulaski, 3 Ark. 1; Treasurers v. Buckner, 2 McMull. 323; Treasurers v. Hilliard, 8 Rich. 412; Foote v. Van Zandt, 34 Miss. 40. It is otherwise in Arkansas. Christian v. Ashley Co., 24 Ark. 142.



by it, who bought them at their full value, is the amount he was afterwards obliged to pay to relieve the property from the lien, and for that amount the officer's sureties are liable.<sup>1</sup> The sureties of a notary public who fraudulently attaches to counterfeit mortgages certificates of their due acknowledgment are liable to one who loans money upon the faith of the instruments for the value they would have had if they were valid; such value to be determined with reference to the apparent worth of the property pretended to be mortgaged.<sup>2</sup>

The sureties on the bond of a justice of the peace are only liable for his misconduct or defaults in respect to his ministerial duties; they are not liable for errors of a judicial character.<sup>3</sup> A justice acts ministerially in making a return to an appeal, and is liable for the damage sustained by making a false one.<sup>4</sup> Where such a return affected a question of law and prevented a reversal of the judgment, the justice was held liable for the amount awarded by it and the costs.<sup>5</sup> For neglecting to issue an execution the damages are *prima facie* the amount of the judgment;<sup>6</sup> but the cost of levying a void execution, or loss incurred in attempting to enforce it, cannot be recovered.<sup>7</sup> The justice may show in mitigation of damages that the debtor does not own sufficient property to satisfy the judgment.<sup>8</sup> It is not a part of the contract of the sureties on an official bond that before they shall become liable their principal shall strictly comply with all the requirements of law so as to constitute himself, before entering upon the duties of his office, in all respects and in every particular an officer *de jure*, and not an officer *de facto* merely. Hence it is not a defense to them that he did not obtain his commission within the time limited by law; nor that he did not take, subscribe and indorse thereon the proper oath of office; nor that his bond was not approved and deposited within the prescribed time; nor that his commission was not sealed.<sup>9</sup> It follows that responsi-

<sup>1</sup> Appleby v. State, 45 N. J. L. 161.

<sup>2</sup> Heidt v. Minor, 89 Cal. 115; McAlister v. Clement, 75 id. 182. See Doran v. Butler, 74 Mich. 643.

<sup>3</sup> McGrew v. Governor, 19 Ala. 89. See Guesdorf v. Gleason, 10 Iowa, 495.

<sup>4</sup> Brooks v. St. John, 25 Hun, 540.

<sup>5</sup> MacDonell v. Buffum, 31 How. Pr. 158.

<sup>6</sup> Nixon v. Hill, 2 Allen, 215; Carpenter v. Warner, 38 Ohio St. 416.

<sup>7</sup> Nixon v. Hill, 2 Allen, 215.

<sup>8</sup> Ibid.; Carpenter v. Warner, *supra*.

<sup>9</sup> State v. Toomer, 7 Rich. L. (S. C.)

bility for the principal's acts is assumed at the date he enters upon the discharge of his duties, unless the bond by its terms extends to past transactions;<sup>1</sup> and that it does not continue beyond the official term for which it was made, except in respect to such duties or business of that term as the incumbent is required to perform and complete afterwards.<sup>2</sup> When the law provides that an officer shall hold until his successor is qual- [34] ified, it has been held that his bond covers his acts as long as he so holds.<sup>3</sup> And this rule has been applied where the term was enlarged by statute, and a new bond required to be given for the time of the extension, and it was not given.<sup>4</sup> And where new bonds are required to be given periodically during an official term, all such additional bonds given during the same term are usually treated as cumulative.<sup>5</sup> The sureties on each are held bound for so much of the term as is subsequent to its

216; *Stevens v. Treasurers*, 2 McCord (S. C.), 107.

<sup>1</sup> *Rochester v. Randall*, 105 Mass. 295.

The liability of sureties upon a liquor seller's bond attaches when it is accepted and approved, though it is not filed in the designated office until some time thereafter. *Brockway v. Petted*, 79 Mich. 620; *People v. Laning*, 73 id. 284.

<sup>2</sup> *People v. Toomey*, 122 Ill. 308; *People v. Foster*, 133 id. 496; 23 N. E. Rep. 615; *Tyree v. Wilson*, 9 Gratt. 59; *Ingram v. McComb*, 17 Mo. 558; *Dumas v. Patterson*, 9 Ala. 484; *State v. Johnson*, 7 Ired. 77; *Poole v. Cox*, 9 id. 69; *Warren v. State*, 11 Mo. 583; *Faulkner v. State*, 9 Ark. 14; *State v. Van Pelt*, 1 Ind. 304; *Evans v. Bank*, 15 Ala. 81; *Dixon v. Caskey*, 18 Ala. 97; *Marney v. State*, 13 Mo. 7; *State v. Wall*, 9 Ired. 20; *State v. Roberts*, 12 N. J. L. 114; *People v. Ring*, 15 Wend. 623; *People v. Ten Eyck*, 13 id. 448; *Tyler v. Nelson*, 14 Gratt. 214; *Low v. Cobb*, 2 Sneed (Tenn.), 18; *Latham v. Fagan*, 6 Jones' L. 62; *Collyer v. Higgins*, 1 Duval, 6; *Larned v. Allen*,

13 Mass. 295; *United States v. Giles*, 9 Cranch, 212; *Elkin v. People*, 4 Ill. 207; *People v. McHenry*, 19 Wend. 482; *Bruce v. State*, 11 Gill & J. 382; *Robey v. Turner*, 8 id. 125; *United States v. Spencer*, 2 McLean, 405; *State Treasurer v. Mann*, 34 Vt. 371; *Wapello v. Bigham*, 10 Iowa, 39; *Loan Co. v. Association*, 48 Pa. St. 446; *State v. Grimsley*, 19 Mo. 171; *Welch v. Seymour*, 28 Conn. 387; *Dover v. Twombly*, 42 N. H. 59; *Thomas v. Summey*, 1 Jones' L. 554; *King v. Nichols*, 16 Ohio St. 80; *McCormick v. Moss*, 41 Ill. 352. See *Governor v. Robbins*, 7 Ala. 79; *Sherrell v. Goodrum*, 3 Humph. 419; *Butler v. State*, 20 Ind. 169.

<sup>3</sup> *Thompson v. State*, 37 Miss. 518.

<sup>4</sup> *Commonwealth v. Drewry*, 15 Gratt. 1. But compare *Brown v. Lattimore*, 17 Cal. 93. See § 485, *ante*.

<sup>5</sup> *Poole v. Cox*, 9 Ired. 69; *Postmaster v. Munger*, 2 Paine C. C. 189; *Miller v. Macoupin*, 7 Ill. 50; *State v. Crooks*, 7 Ohio, 573; *Governor v. Robbins*, 7 Ala. 79. Compare *Hewett v. State*, 6 Harr. & J. 95.

execution.<sup>1</sup> It is otherwise, of course, where on the execution of a new bond the sureties in the preceding one are in form or by implication released.<sup>2</sup> And a substituted surety in an existing bond will be held liable for past as well as subsequent transactions covered by it as executed by the original surety.<sup>3</sup>

Where the same official duty is neglected continuously from one term into another, by the same officer succeeding himself,—as where an execution is delivered to a sheriff near the close of his term, and he neglects to execute it, and by law it passes to the incumbent of the succeeding term, for which the same person is re-elected, who after his re-election continues his neglect to serve the writ,—the party injured may sue the sureties in the bond for either term at his election.<sup>4</sup> And the circumstance that he might recover on the second, if he had chosen to do so, will not go even in mitigation in an action on the first bond.<sup>5</sup>

A bond given by a public officer is only a collateral security [35] for the faithful performance of his official duties. This collateral obligation can exist no longer than the liability it was created to secure. It is of the essence of the contract of suretyship that there be a subsisting valid obligation of the principal debtor. Whatever, therefore, amounts to a good defense to the original liability of the principal is such for the sureties.<sup>6</sup>

If a town which sues the sureties on an officer's bond is indebted to the officer upon an implied contract for services which grew out of and are connected with the claim made, the damages which the town has suffered are lessened to the

<sup>1</sup> Id.

<sup>2</sup> *Miller v. Moore*, 3 *Humph.* 189.

<sup>3</sup> *Treasurers v. Taylor*, 2 *Bailey*, 524.

The sureties on a bond which recites that it is given in lieu of a former bond are liable for the acts of their principal from the beginning of his term. *State v. Finn*, 23 *Mo. App.* 290.

<sup>4</sup> *State v. Roberts*, 12 *N. J. L.* 114.

<sup>5</sup> *State v. Wall*, 9 *Ired.* 20. If a dep-

uty-sheriff neglects to execute process which is placed in his hands while he is acting as such for one sheriff, and such deputy is re-appointed by the former sheriff's successor and his neglect continues under his re-appointment, the last sheriff is responsible for it. *Simmonds v. Henchy*, 16 *L. R. Ire.* 467.

<sup>6</sup> *State v. Blake*, 2 *Ohio St.* 147; *Mt. Pleasant Bank v. Conway*, 18 *Ohio*, 234.

extent of the value of such services, and the sureties are entitled to the benefit of it in mitigation of their liability.<sup>1</sup>

§ 489. **Measure of damages against officers for neglect of duty.** The measure of damages for negligent escapes is not uniform in the several jurisdictions; there is also some variance as to the burden of proof. In Ohio, on proving his judgment against the escaped debtor, the plaintiff in an action against the sheriff is *prima facie* entitled to recover the whole amount of his debt. To reduce the recovery below that the burden is upon the defendant, who may not show that the amount is still collectible from the debtor, but may show his partial or total insolvency at the time he made his escape. The plaintiff is entitled to recover at least nominal damages. If the officer permitted the escape through fraud, malice or corruption, exemplary damages may be awarded against him.<sup>2</sup> In Vermont an officer who holds final process against a debtor's body and neglects an opportunity to serve it or to arrest him is absolutely liable for the debt.<sup>3</sup> The same result follows there and in Pennsylvania when the debtor escapes from the liberties of the jail by reason of the insufficiency of the security taken by the sheriff or the neglect of the prison officials.<sup>4</sup> In Connecticut the damages recoverable by a sheriff on the security taken by him for prison liberties include the debt, costs of the execution and interest.<sup>5</sup> In Massachusetts the plaintiff is entitled to nominal damages on proof of an escape, but he cannot recover anything beyond that except an actual loss be shown. The officer may show in mitigation that the debtor was unable to pay the debt,<sup>6</sup> or that it was barred by the statute of limitations.<sup>7</sup> The burden of proving that he had a valuable debt against the person who has escaped is upon the plaintiff; this is not established by showing that he holds a note signed by him, if on its face it appears that it was barred when the escape was consummated.<sup>8</sup> In

<sup>1</sup> Brunswick v. Snow, 73 Me. 177.

<sup>2</sup> Hootman v. Shriner, 15 Ohio St. 43.

<sup>3</sup> Goodrich v. Starr, 18 Vt. 227.

<sup>4</sup> Wheeler v. Pettes, 21 Vt. 398;

Saunders v. Smith, 6 Penn. Co. Ct.

257; Saunders v. Quigg, 112 Pa. St.

546.

<sup>5</sup> Seymour v. Harvey, 8 Conn. 63.

<sup>6</sup> Weld v. Bartlett, 10 Mass. 470;

Brooks v. Hoyt, 6 Pick. 468; Woods

v. Varnum, 21 id. 165.

<sup>7</sup> Slocum v. Riley, 145 Mass. 370.

<sup>8</sup> Id.



North Carolina only the actual damages can be recovered.<sup>1</sup> In Georgia the liability for an escape on *mesne* process is *prima facie* the original debt; the officer may show, the burden of proof being upon him, that the debt could not have been made out of the debtor.<sup>2</sup> This is the rule in Arkansas,<sup>3</sup> and in Maryland,<sup>4</sup> where the escaped debtor is confined on final process. The common-law rule that the insolvency of the debtor was provable by the sheriff in mitigation<sup>5</sup> has been changed by legislation in New York.<sup>6</sup> Under a statute which declares that the undertaking of the bail is "that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein," and the liability of the sheriff to be that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail," an officer cannot mitigate the damages if bail is not put in by proof of the debtor's insolvency.<sup>7</sup> Such proof was not admissible on behalf of the bail under the English statutes.<sup>8</sup> In Indiana the liability of the sureties of a sheriff who voluntarily permits an escape does not extend beyond the actual damages.<sup>9</sup> But the officer himself is liable for the amount of the judgment notwithstanding the insolvency of the prisoner;<sup>10</sup> and *prima facie* the same measure of liability attaches to a constable who purposely allows a defendant to escape after a preliminary examination in a bastardy proceeding and before final judgment.<sup>11</sup> If the escape was the result of mere negligence the prisoner's inability to satisfy the judgment may be shown to mitigate the damages.<sup>12</sup> And if the prisoner is re-arrested and held in custody under a judgment recovered against him while he was at large, the

<sup>1</sup> State v. Falls, 63 N. C. 188.

<sup>2</sup> Crawford v. Andrews, 6 Ga. 244.

<sup>3</sup> Faulkner v. State, 6 Ark. 150.

<sup>4</sup> State v. Baden, 11 Md. 317.

<sup>5</sup> Patterson v. Westervelt, 17 Wend. 543.

<sup>6</sup> Dunford v. Weaver, 84 N. Y. 445.

<sup>7</sup> Metcalf v. Stryker, 31 N. Y. 255;  
Bensel v. Lynch, 44 id. 162.

<sup>8</sup> Beddome v. Holbrooke, 1 B. & P. 450, n.: Maurice v. Partridge, 14 East, 599; Rooksby v. State, 92 Ind. 71; Turner v. State, 66 id. 210.

<sup>9</sup> State v. Johnson, 1 Ind. 158.

<sup>10</sup> State v. Hamilton, 33 Ind. 502; State v. Mullen, 50 id. 598.

<sup>11</sup> Lakin v. State, 89 Ind. 68.

<sup>12</sup> State v. Mullen, 50 Ind. 598.

sheriff's liability is confined to the actual damages.<sup>1</sup> In England the damages are to be measured by "the value of the custody of the debtor at the moment of escape."<sup>2</sup> In equity the sheriff is charged with the whole debt and has the burden of proving that less would have been recovered if the prisoner had not escaped, in answer to which the plaintiff may show what sources of payment were open to him.<sup>3</sup> On this question the jury may take into consideration not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt or any portion of it would have been paid if he had remained in custody, as that the debtor was an only son and his father was wealthy and very old and that the debtor's solicitor had made an offer to compromise the debt of his client.<sup>4</sup>

**§ 490. Same subject.** Some of the early American cases applied a very harsh measure of liability to officers who refused or neglected to serve final process. Such conduct, it was held, made the debt upon which the process was issued the officer's own, and he was liable for the full amount of it, notwithstanding the debtor was unable to pay it or any part of it.<sup>5</sup> But the later cases establish the reasonable and just rule that the measure of liability, if the officer acts in good faith, is the actual damages the plaintiff sustains.<sup>6</sup> The value of property lost by reason of a void levy is the measure of damages,<sup>7</sup> not its appraised value, though the officer's return shows that value.<sup>8</sup> The value of the property is to be determined by what it would have brought at such a sale as the officer was to have made.<sup>9</sup> As in other cases of breach of duty, an officer is liable at least for nominal damages for failing to return an execution.<sup>10</sup> And if the judgment debtor has sufficient property to satisfy it the sheriff is liable for the amount, unless he shows some reason for not making the money;<sup>11</sup> as that the debt was not collectible on account of the

<sup>1</sup> *State v. Newcomer*, 109 Ind. 243; *State v. Caldwell*, 115 id. 6.

<sup>2</sup> *Arden v. Goodacre*, 11 C. B. 371.

<sup>3</sup> *Moore v. Moore*, 25 Beav. 8.

<sup>4</sup> *Macrae v. Clark*, L. R. 1 C. P. 403.

<sup>5</sup> *Turner v. Lowry*, 2 Aik. (Vt.) 72; *Hall v. Brooks*, 8 Vt. 485.

<sup>6</sup> *Blodgett v. Brattleboro*, 30 Vt. 579.

<sup>7</sup> *Hurlock v. Reinhardt*, 41 Texas, 580; *French v. Snyder*, 30 Ill. 339.

<sup>8</sup> *Parker v. Peabody*, 56 Vt. 221.

<sup>9</sup> *Harris v. Murfree*, 54 Ala. 161.

<sup>10</sup> *Gallup v. Robinson*, 11 Gray, 20.

<sup>11</sup> *Bank of Rome v. Curtis*, 1 Hill, 275; *Pardee v. Robertson*, 6 id. 550; *Swezey v. Lott*, 21 N. Y. 481; *Dunphy v. Whipple*, 25 Mich. 10.

debtor's insolvency;<sup>1</sup> but not by showing that the judgment may yet be collected.<sup>2</sup> The statutory damages for not returning an execution cannot be recovered in a common-law action on the sheriff's bond. In such an action there can be no recovery of more than nominal damages, unless the proof shows that greater damages were sustained.<sup>3</sup>

If there is needless delay in executing a writ of assistance as the result of which the parties in possession of the property wilfully and maliciously injure or destroy it, the officer's negligence is the proximate cause of their acts and he is liable for the consequences.<sup>4</sup> Substantial damages may be recovered for wrongfully refusing to execute a writ of possession, including, it seems, the value of the rents and profits of the premises from the date of the return of the writ to the time of judgment in the action in which the writ was issued, subject to deduction on the principle requiring the plaintiff to do his duty by exercising reasonable diligence to minimize the loss.<sup>5</sup>

In Connecticut the early cases held an officer who neglected to serve *mesne* process liable for the plaintiff's whole debt.<sup>6</sup> In a later case it is said that it is peculiarly the province of the jury to assess the damages, "and in doing so they are not limited to any precise sum. They may even give more than the plaintiff's original debt. Where that debt has been lost by the wilful misconduct or negligence of the officer, they may add to it the costs and charges of a second suit. And as the jury may give more than the debt, so they may give less. And if it should be found by them that the failure of the officer to return the writ was owing to a mere mistake in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nom-

<sup>1</sup> Crooker v. Melick, 18 Neb. 227; Hellman v. Spielman, 19 id. 152; Ledyard v. Jones, 7 N. Y. 550; Abbott v. Gillespy, 75 Ala. 180; State v. Dixon, 80 Ind. 150; Collier v. State, 10 id. 58.

In some states constables are by statute made absolutely liable for the amount of the debt for neglecting to return an execution. Robertson v. County Com'rs, 10 Ill. 559; Limpus

v. State, 7 Blackf. 43; Bachman v. Fenstermacher, 112 Pa. St. 331.

<sup>2</sup> Ledyard v. Jones, 7 N. Y. 550.

<sup>3</sup> Marcum v. Burgess, 67 Ala. 556.

<sup>4</sup> Chapman v. Thornburgh, 17 Cal. 87.

<sup>5</sup> State v. Harrington, 41 Mo. App. 439.

<sup>6</sup> See Gleason v. Chester, 1 Day, 152; Hubbard v. Shaler, 2 id. 195.

inal damages.”<sup>1</sup> In the absence of bad faith or other aggravating circumstances the measure of liability for the failure to attach property is the damage sustained,<sup>2</sup> which is *prima facie* the amount of the judgment and costs, with interest on the former.<sup>3</sup> The sufficiency of the levy made is to be determined by the result of the sale, not by an appraisal made subsequent to the attachment.<sup>4</sup> If by reason of the officer’s neglect a subsequent writ is first levied and a part of the debtor’s property is not covered by it, the damages against the officer may be mitigated to the extent of the value of that portion if the creditor might have levied upon it.<sup>5</sup> If the attachment plaintiff knows of the officer’s neglect to serve the writ and the property remains in the same situation as before he cannot decline to have a second issued and after its attachment by another creditor recover the value of the property from the officer.<sup>6</sup> But in Massachusetts a creditor whose lien is lost through an officer’s neglect in levying an execution is not bound to waive his rights against the latter and take out another writ unless on request or an offer of indemnity; the officer is liable for the value of the lien that would have been obtained but for his dereliction.<sup>7</sup>

§ 491. **Same subject.** If property held under process is released by the officer without the approval of the bond by the creditor and the sureties are insolvent, the officer must respond for the resulting loss.<sup>8</sup> And if property in the officer’s custody is lost by his negligence he is liable for its value,<sup>9</sup> and is not entitled to have deducted therefrom the expense which might have been incurred in keeping it.<sup>10</sup> If property lawfully attached and held is sold illegally and between the time of the attachment and sale it deteriorated in value, without fault on the officer’s part, his liability in an action on the case is for its value at the time of the sale.<sup>11</sup> If mortgaged chattels are levied upon and sold and possession thereof given

<sup>1</sup> Clark v. Smith, 10 Conn. 1, 6.

<sup>2</sup> Ransom v. Halcott, 18 Barb. 56;  
Perkins v. Pitman, 34 N. H. 261.

<sup>3</sup> Springett v. Colerick, 67 Mich.  
362, 370.

<sup>4</sup> Ransom v. Halcott, 18 Barb. 56.

<sup>5</sup> Townsend v. Libbey, 70 Me. 162.

<sup>6</sup> Clark v. Smith, 10 Conn. 1; Blodg-

ett v. Brattleboro, 30 Vt. 579; French  
v. Willett, 10 Bosw. 566.

<sup>7</sup> Franklin Co. Nat. Bank v. Kimball, 152 Mass. 331.

<sup>8</sup> Miner v. Coburn, 4 Allen, 136.

<sup>9</sup> Tudor v. Lewis, 3 Met. (Ky.) 378.

<sup>10</sup> Lovejoy v. Hutchins, 23 Me. 272.

<sup>11</sup> Walker v. Wilmarth, 37 Vt. 289.



to the purchaser without requiring him to pay the debt or perform the contract which the mortgage was given to secure, the officer is liable on his bond and cannot avoid responsibility by showing that the purchaser is solvent; but if the property is so situated that the mortgagee may subject it to his mortgage, he is bound to do so, and can recover from the officer only such damages as he has actually sustained.<sup>1</sup> By neglecting to tender a deed to the purchaser of land at an execution sale and conveying the land to another the sheriff releases such purchaser and becomes liable for the difference between the amount of his offer and the sum paid by the other person.<sup>2</sup> And by making a sale under an execution on credit without authority from the creditors he assumes responsibility for the amount for which the property was sold, but not for interest on it;<sup>3</sup> but if interest is received on the purchase-price of property so sold the officer must account for it to the execution debtor if the creditors have been paid.<sup>4</sup>

The measure of damages for taking an insufficient bail bond is *prima facie* the amount of the judgment against the debtor, subject to reduction by proof that he was unable to pay.<sup>5</sup> That fact will not mitigate the damages for refusing to deliver such a bond,<sup>6</sup> but the insolvency of the bail may be shown for that purpose.<sup>7</sup> If an insufficient replevin bond is negligently taken the sheriff is liable to the defendant who has obtained judgment for the return of the property for its value at the time it was taken and the costs of the replevin suit,<sup>8</sup> and also of a futile suit on the bond.<sup>9</sup> The amount recoverable by the plaintiff in the replevin suit is not the value of the property, but the amount of his loss.<sup>10</sup> Where the defendant in such suit brings an action against the officer the latter may show, the suit in replevin having been dismissed, that the property was owned and possessed by the plaintiff in that suit.<sup>11</sup>

<sup>1</sup> McDaniel v. State, 118 Ind. 239;  
Slifer v. State, 114 id. 291.

<sup>2</sup> State v. Lines, 4 Ind. 351.

<sup>3</sup> Chase v. Monroe, 30 N. H. 427.

<sup>4</sup> Farley v. Moore, 21 N. H. 146.

<sup>5</sup> West v. Rice, 9 Met. 564; Danforth v. Pratt, 9 Cush. 318.

<sup>6</sup> Simmonds v. Bradford, 15 Mass.  
82; Seeley v. Brown, 14 Pick. 177.

<sup>7</sup> Bradt v. Holden, 12 R. I. 335.

<sup>8</sup> O'Grady v. Keyes, 1 Allen, 284.

<sup>9</sup> Norman v. Hope, 13 Ontario, 556;  
14 id. 287.

<sup>10</sup> Carter v. Duggan, 144 Mass. 32;  
Mortland v. Smith, 32 Mo. 225.

<sup>11</sup> Case v. Babbitt, 16 Gray, 278.

In the absence of proof of pecuniary loss resulting from a false return the officer's liability, independently of statute, is limited to nominal damages.<sup>1</sup> But if the amount an execution calls for has been lost by reason of such a return the officer cannot lessen his liability for it by showing that it was not due under the judgment;<sup>2</sup> but he may do so by proving that prior executions in his hands would have exhausted the property.<sup>3</sup> If property is sold for taxes as the result of a false return of personal service, the officer is liable for its reasonable value with interest.<sup>4</sup> For a false return of *nulla bona* he must respond for such value, as shown by a sale of the property under a subsequent execution in favor of another creditor.<sup>5</sup>

§ 492. **Same subject.** A judgment creditor can only recover, without proving more, nominal damages against officers who refuse to place upon the tax-roll they make the amount necessary to pay a judgment held by him.<sup>6</sup> But in a very aggravated case the officers were held liable for counsel fees.<sup>7</sup> A more rigid rule prevails in New York. There an officer who refused to comply with a statute which made it his duty to present to the proper authorities the re-assessment of damages found by a jury as compensation for laying out a highway was held liable for the amount thereby awarded with interest on it; although the plaintiff might have presented his claim to the authorities at a subsequent time, he was not obliged to do so.<sup>8</sup> Under a statute which makes a town liable to a purchaser of property at a tax sale for all damages which have accrued to him by reason of the tax collector's neglect of duty, the measure is the sum paid with interest, not the value of the property.<sup>9</sup> A drainage commissioner who fails to properly construct a drain is liable for the expense of fin-

<sup>1</sup> *Pelham v. Way*, 15 Wall. 196.

<sup>2</sup> *Bacon v. Cropsey*, 7 N. Y. 195.

<sup>3</sup> *Forsyth v. Dickson*, 1 Grant's Cas. (Pa.) 26.

Under the Missouri statute the liability for a false return is absolute. *State v. Case*, 77 Mo. 247.

<sup>4</sup> *State v. Finn*, 13 Mo. App. 285.

<sup>5</sup> *Thayer v. Roberts*, 44 Me. 247.

<sup>6</sup> *Dow v. Humbert*, 91 U. S. 294;

*Branch v. Davis*, 29 Fed. Rep. 888.

The first case is fully stated and the grounds upon which it is ruled are given in vol. 1, § 161.

<sup>7</sup> *Newark Savings Inst. v. Panhorst*, 7 Biss. 99.

<sup>8</sup> *Clark v. Miller*, 54 N. Y. 528.

<sup>9</sup> *Saulters v. Victory*, 36 Vt. 351.

ishing it according to the plan he should have followed.<sup>1</sup> A collector of customs refused to sign a bill of entry unless a sum which he erroneously claimed as duty was paid. After payment under protest the property was delivered to the importer. The officer was liable for the sum collected and the loss arising from the detention of the property, including a decline in its price which occurred between the time of his refusal and its delivery.<sup>2</sup> The purchaser of land, a defect in the title to which was not discovered because of an error on the part of an officer, may recover from him the price paid, the expense of the sale and of a suit to maintain his possession, the defense being made in good faith; possibly, also, the sum expended in making repairs upon the property, if that cannot be recovered from the actual owner.<sup>3</sup>

In the latest English edition of Mayne on Damages<sup>4</sup> the law concerning the liability of sheriffs for the breach of miscellaneous duties is thus stated: The principle that where the sheriff has been in fault the plaintiff is entitled to be placed in the same position by means of damages as if the defendant had done his duty is maintained in actions for delay in executing a writ of arrest;<sup>5</sup> in selling under a *fi. fa.*;<sup>6</sup> in returning the writ;<sup>7</sup> for a false return;<sup>8</sup> for not levying.<sup>9</sup> In all these the damages are measured, not by the amount of the debt, but by the amount which could or would have been recovered if the breach of duty had not taken place.<sup>10</sup> And if the sheriff return *nulla bona* to a writ of *fi. fa.*, and the creditor knows of goods belonging to his debtor, he need not sue forth a second writ of *fi. fa.*, but may, in an action for a false return, recover the value of the goods which the sheriff ought to have taken.<sup>11</sup>

<sup>1</sup> Smith v. State, 17 Ind. 167.

<sup>2</sup> Barrow v. Arnaud, 8 Q. B. 595.

<sup>3</sup> Brown v. Penn, 1 McGloin (La.), 265. See Howe v. Taylor, 9 Ore. 288.

<sup>4</sup> 4th ed. (1884), p. 437.

<sup>5</sup> Clifton v. Hooper, 6 Q. B. 468.

<sup>6</sup> Aireton v. Davis, 9 Bing. 740; Bales v. Wingfield, 4 Q. B. 580, n.

<sup>7</sup> Rex v. Sheriff of Essex, 1 M. & W. 720.

<sup>8</sup> Crowder v. Long, 8 B. & C. 598; Heenan v. Evans, 3 M. & Gr. 398.

<sup>9</sup> Augustien v. Challis, 1 Ex. 279; Mullett v. Challis, 16 Q. B. 239.

<sup>10</sup> And all the probabilities of the case must be looked at; as, for example, whether or not, if the execution had been levied, the plaintiff would have got any benefit from it, the other creditors of the execution debtor having been in a position to make him bankrupt. Hobson v. Thellusson, 8 B. & S. 476; L. R. 2 Q. B. 642.

<sup>11</sup> Per cur., Arden v. Goodacre, 11 C.

There is a difference to be observed in these actions, viz., that in those the whole gist of which is pecuniary damage some such damage must be proved or the action will fail. But in others there is an injury to a right, even independent of actual loss, and the fact of loss being negatived merely makes the damages nominal. Thus in an action for a false return,<sup>1</sup> for not arresting on *mesne* process,<sup>2</sup> or for permitting a debtor arrested on *mesne* process to escape,<sup>3</sup> it has been held that proof of absence of loss entitled the defendant to a verdict.<sup>4</sup> In all these cases the truth of the return or the detention of the debtor was only of importance to the plaintiff as contributing to some ulterior result. If no such result could have been produced, or has been effected by it, there was no ground of action. But the case of escape on final process was different. The creditor, it was said, when he was ascertained to be such by a judgment, and had charged the debtor, had a right to the body of his debtor every hour till the debt was paid.<sup>5</sup> This itself was the end, not the means. Consequently, a right of action for nominal damages arose on any escape, for however short a time, even though no pecuniary damage arose,<sup>6</sup> or on any delay in making the arrest.<sup>7</sup> It would appear in all cases in which damage is necessary to maintain the action that proof of the breach of duty will lay upon the defendant the *onus* of showing that no damage ensued; but to entitle plaintiff to substantial damage specific evidence of loss must be given.<sup>8</sup>

B., at p. 377; 20 L. J. (C. P.) 184. *Prima facie*, the measure of damage is the value of the goods which might have been and were not levied. *Hobson v. Thellusson*, *supra*.

<sup>1</sup> *Wylie v. Birch*, 4 Q. B. 566; *Levy v. Hall*, 29 L. J. (C. P.) 127; *Stimson v. Farnham*, L. R. 7 Q. B. 175; 41 L. J. (Q. B.) 52.

<sup>2</sup> *Curling v. Evans*, 2 M. & G. 349.

<sup>3</sup> *Williams v. Mostyn*, 4 M. & W. 145; *Lewis v. Morland*, 2 B. & A. 56-64; *Planck v. Anderson*, 5 T. R. 37, overruling *Barker v. Green*, 2 Bing. 317.

<sup>4</sup> So where the action was against

the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor. *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J. (Ex.) 362. See, also, *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; 30 L. J. (Ex.) 231.

<sup>5</sup> *Per Buller, J., Planck v. Anderson*, 5 T. R. 40.

<sup>6</sup> *Williams v. Mostyn*, 4 M. & W. 153.

<sup>7</sup> *Clifton v. Hooper*, 6 Q. B. 468.

<sup>8</sup> *Bales v. Wingfield*, 4 Q. B. 580, n.; *Wylie v. Birch*, 4 Q. B. 566, 578; *Scott v. Henley*, 1 M. & Rob. 227.



## SECTION 4.

## PROBATE BONDS.

§ 493. **Bonds for administration of decedents' estates.** The responsibility of the obligors in these bonds arises from their contract which is adapted to secure the performance of the principal's duties. These include making and returning a full and true inventory, care and fidelity in the preservation and administration of the estate, and in the end a faithful accounting. In the case of decedents' estates assets constitute a trust fund, first for creditors and secondly for legatees and distributees.<sup>1</sup> The ordinary administration bond has substantially the following conditions: (1) that the administrator will make and exhibit an inventory; (2) that he will well and truly administer the estate; (3) that he will make a true account of his administration; and (4) that he will deliver and pay over to the persons entitled the residue. Distributees have an interest in the performance of all these conditions; creditors only in the performance of the first two.<sup>2</sup>

<sup>1</sup> Dawson v. Dawson, 25 Ohio St. 443.

<sup>2</sup> Blakeman v. Sherwood, 32 Conn. 324.

In *Ordinary v. Cooley*, 30 N. J. L. 271, Vredenburg, J., gives an interesting sketch of the early practice and the successive statutes on the subject of administration of the personal estates of deceased persons. He says: "In very early times the king, as *parens patriæ*, was entitled to the personal property of intestates. He took possession of them, and, practically, after paying debts, gave two-thirds to the widow and children and kept the balance himself. This payment of debts and giving two-thirds to the widow and children was a matter of grace and not of legal right. He had the legal right to keep the whole if he saw fit. But in those early times the influence of the Roman clergy was very great and

continually on the increase. They represented to the king that the souls of the intestates were inconveniently delayed in purgatory for the want of masses said for them, and that it was an unconscientious thing in him to deprive the intestate by distribution thus of his own property just when he most wanted it, and that the king ought to pass his prerogative in this regard to them so that they could appropriate it to that use, and thus the true owner get the value of his property. Partly by such persuasions and partly from fear of the pope the king finally passed these prerogatives to Roman bishops, who, by virtue thereof, stood in the king's shoes, and so legally entitled to the whole personal estate of intestates; and this is the origin of the ecclesiastical courts of England, and the prerogative and orphans' courts in this state. The Roman clergy, being thus under

**§ 494. How such bonds made; what recoveries may be had.** Such bonds are usually executed to the state or to [36] some officer having probate jurisdiction. When sued for the benefit of the estate, as the practice is in some states, espe-

no legal obligation to pay debts or to distribute any part of the estate to the next of kin, felt bound in conscience strictly to execute the trust. The widow and children easily acquiesced in this arrangement, but the creditors were always somewhat reluctant; and accordingly we find that the barons at Runnymede procured an insertion in *Magna Charta* that the bishops should pay the debts and distribute. But the Roman clergy had influence enough to avoid its execution. So that this provision of the great charter fell obsolete. Not only so, but afterwards, in the great charter of Henry the Third, they had influence enough to cause the whole subject-matter to be ignored. Things remained in this condition, the bishops having the legal right to all the personal property of intestates, and without either paying debts or accounting to the next of kin, until the thirteenth year of the reign of Edward the First, when it was enacted that the ordinary should be bound to pay the debts of the intestates as far as his goods extended. But the ordinary yet gave no security whatever, and all the residuum, after the payment of debts, still remained in his hands to be disposed of for pious uses. Thus it continued until the thirty-seventh year of the reign of Edward the Third, when parliament, in consequence of the flagrant abuses practiced, enacted that, in case where a death of an intestate occurs, the ordinary shall depute of the next and most lawful friends of the dead person to administer his goods; which persons deputed shall have action to demand and recover as executors

the debts of said intestate to administer and dispense for the soul of the dead, and shall answer also in the king's courts to others to whom the said deceased was holden and bound.' It will be observed that this statute merely took from the ordinaries the power to administer, and compelled them to grant the administration to the next and most lawful friends of the intestate; and all the administrator had to do was to pay the debts. He gave no bond of security; and he retained all the residuum after the payment of debts as his own property.

"There was yet no such thing as distribution amongst the next of kin, or security given by the administrator either to pay debts or to distribute. As soon as the debts were paid the estate was administered, and there was nothing further to be done by the administrator. All the rest of the estate belonged to himself to *dispende*, in the language of the statute, for the soul of the dead. The administration by this statute, it will be observed, was granted to the next and most lawful friends of the intestate. The language was afterwards altered by the statute of Henry VIII., and the ordinary compelled to grant the administration to the widow or the next of kin of the intestate; and which is the same as our own statute now in force. It will be perceived that as yet no change is made in the rights of the administrator. There is yet no statute of distribution; the administrator takes all after the payment of debts. But this statute of 21 Henry VIII. introduces one great change. It re-

[37] cially for the breach of the first condition, the recovery inures to the benefit of all parties interested in the same order as they would have been benefited by a due performance of the administrator's duty. There can be no recovery

quires, for the first time in the history of administrations, that the ordinary shall take surety from the administrator, not to distribute, but only to pay debts. It could not have been, surely, that the administrator shall settle in the prerogative court, and pay the surplus after the payment of debts to the next of kin, for the surplus yet belonged to the administrator himself, to do with it as he pleased; and, moreover, there was as yet no statute of distribution. But the only surety that could be required was that the administrator would make and exhibit an inventory, and pay the debts, or, as it was then technically called, administer the estate. So that, by the statute of 21 Henry VIII., the bond given by the administrator contained two conditions; one was the exhibiting an inventory, the other was to pay the debts. These, it will be observed, are the two first conditions in the bond now required by our statute. . . . But these two first conditions were provided in the interest of creditors, and not in the interest of the next of kin; because there were yet no next of kin that could take or had an interest in the estate. Things remained in this condition until the 22d of Charles II., over a hundred years, when the first English statute of distributions was passed. This statute provided that the ordinary should call administrators to account, and order a just and equal distribution (after debts and funeral expenses were paid) among the wife and children and next of kin, substantially as our statute does now. And it provided in the second place, that the

ordinary should require of the administrator a bond with security, and with the same conditions as our statutes now provide, viz.: 1st, to file an inventory; 2d, to well and truly administer the estate, or, in other words, to pay the debts; 3d, account in the prerogative court; and 4th, pay the surplus found upon such accounting to the next of kin. Hence it is manifest that these two last conditions in the bond were required to compel the administrator to perform the two additional duties imposed upon him by the last statute of 22 Charles II., viz.: 1st, to account to the prerogative court; 2d, to pay over the surplus found upon such accounting to the next of kin. This is further manifested from another historical fact. After the said statute of Edward III. took away from the Roman bishops the power to administer themselves, and forced them to grant administration to the next of kin, like other people, they were very prompt to force others to be honest, as soon as they had no temptation to be otherwise themselves, and they attempted to force the administrator to give security to distribute to the next of kin; but they were restrained by the courts of common law, by prohibitions, upon the ground that the statute of Edward III. meant to give to the administrator appointed by the ordinary the same rights of property that the ordinary himself had before that statute was passed, and that consequently the administrator was not obliged to account or distribute, and that his only duty was to pay the debts, and that he might do with the surplus what he pleased; and no



beyond nominal damages unless there is such misconduct [38] of the administrator as results in actual injury to some person for whose protection the bond is required.<sup>1</sup>

The heir at law may prosecute a suit on the bond in the name of the obligee for neglect to return an inventory, although his precise interest as heir has not been definitely ascertained, either by settlement of the administration account, or by an order for distribution;<sup>2</sup> but one who claims as next of kin, and is not entitled to a distributive share, cannot prosecute such an action.<sup>3</sup> In the former case the full value of the property withheld from the inventory may be recovered. The estate [39] is the loser to that precise extent; and the loss should be made good. If any equitable circumstances exist which would go to show that the loss is less, it devolves on the defendant to prove them.<sup>4</sup> The plaintiff acts as trustee for the persons beneficially interested in the estate.<sup>5</sup> And the money recov-

bond ever was or ever could be required of the administrator to account or distribute until those additional duties were expressly imposed upon him by the said statute of 22 Charles II. This statute was passed in the year 1661, and was among the very first of our colonial statutes, and has to this day remained unaltered upon our statute book. So that by this short historical resumé, it appears that originally the administrator neither paid debts nor distributed. After some hundreds of years, he was first made to pay debts; after some more hundreds of years, he was next made to give security to pay debts; after over a hundred years more, he was made to distribute the surplus after paying debts, and to insert in his bond the additional condition that he should distribute. So that it would appear that these conditions of our administration bonds of the present day were the growth of many centuries of English legislation, each additional condition being added as each additional duty was imposed by statute

upon the administrator. Thus we see how each stone was laid in the edifice, and came to have its peculiar form and color. The very antiqueness of the language of these conditions gives evidence of their origin, and their natural import is in accord with their history."

<sup>1</sup> *Edwards v. White*, 12 Conn. 28; *Spencer v. Wilkinson*, 11 id. 1; *Adams v. Spaulding*, 12 id. 350; *Scarborough v. State*, 24 Ark. 20; *State v. Bloxom*, 1 Houst. 446.

The costs of proceedings taken to compel an administrator to account are chargeable to his sureties; but not the amount paid for counsel fees therein. *Mann v. Everts*, 64 Wis. 372.

<sup>2</sup> *Blakeman v. Sherwood*, 22 Conn. 324.

<sup>3</sup> *Judge of Probate v. Southard*, 62 N. H. 228.

<sup>4</sup> *Blakeman v. Sherwood*, 32 Conn. 324, 329; *Minor v. Mead*, 3 Conn. 289; *State v. Bennett*, 24 Ind. 383; *Boston v. White*, 21 Pick. 58. See *Dawson v. Dawson*, 25 Ohio St. 443.

<sup>5</sup> *Thomas v. Leach*, 2 Mass. 152;



ered must be applied to the payment of all the debts of the intestate in their order, giving preference to those that have a preference by law, and making a ratable distribution among all others.<sup>1</sup> If the estate be insolvent, each creditor is entitled to receive an average with others.<sup>2</sup> There is no liability beyond the amount of assets which come to the hands of the administrator. But it is his duty to apply them to the payment of debts; and a suit on his bond by a creditor having a debt so liquidated that it is the administrator's duty presently to pay it is an action to recover for a breach of the bond. And it is no answer to such an action that the administrator has not wasted or misapplied the assets. His retention of the assets, and failure to apply them to such debt, is a breach of the bond.<sup>3</sup> A creditor is in such cases entitled to recover the amount of his debt on the bond if the assets are sufficient; and if not, such ratable proportion thereof

Paine v. Ball, 3 Mass. 235; Skinner v. Phillips, 4 Mass. 874; Rowland v. Isaacs, 15 Conn. 115.

<sup>1</sup> Dickerson v. Robinson, 6 N. J. L. 202. In this case Kirkpatrick, C. J., said: "This is certainly the course of the ecclesiastical courts in England. . . . To show the more clearly that the application of the money recovered in these actions must necessarily be to the payment of all debts, let us pursue the thing a little. Let us suppose the administrator to have wasted the whole estate, and to be himself insolvent, and that there is nothing to respond to creditors but the administration bond; shall he that can first get the assignment of it, and a verdict and judgment for his debt, even though it be a simple contract debt, swallow up the whole penalty, take the whole money recovered to himself, and leave all other debts, even of a superior order, altogether unpaid? This, I think, would be hardly maintained by anybody; and it is to prevent this that the money recovered must be distributed by the

judge of the prerogative court. What then is to be done upon such a recovery? Is the judge of the prerogative court to divide the sum so recovered among all the creditors, and so pay the assignee of the bond but a part of his debt [as would be the case if the assignee recovered only the damage to himself], and then put every other creditor to go through with the same course, and make a like division of what he might recover? And if it be an estate in which there is a surplus, shall he, after all, compel the next of kin to run the same race? This would, indeed, as Lord Ch. J. Holt says, *be endless and infinite*. But it is not so. No such breach can be assigned. The law runs itself into no such absurdity."

<sup>2</sup> Warren v. Powers, 5 Conn. 373.

<sup>3</sup> Cannon v. Cooper, 39 Miss. 784; State v. Nichols, 10 Gill & J. 27; Lining v. Giles, 3 Brev. 530; People v. Dunlap, 13 Johns. 437; Hazen v. Durling, 2 N. J. Eq. 133; Brown v. Glascock's Adm'r, 1 Rob. (Va.) 461.

as it was the administrator's duty to pay.<sup>1</sup> Suits by legatees and distributees may also be instituted for the amount of the legacy or distributive share, when the administration has gone to such point that the immediate duty to pay it is imposed and neglected.<sup>2</sup> Service performed, or money expended, in aid of the defendant's administration cannot be shown in support of a suit on his bond, nor as a set-off against payments by the administrator, but are a claim on the defendant individually.<sup>3</sup>

Where the breach is the non-payment of a dividend [41] struck in the probate court, on a plea of payment, receipts showing payment to the plaintiff by a former administrator are admissible in evidence, and their effect cannot be defeated by showing waste by such former administrator.<sup>4</sup>

§ 495. **Actions on bond as to sureties.** In an action against the sureties on an administrator's or a guardian's bond for a breach by the principal, the proceedings taken in the probate court, in passing on the account rendered by the administrator or guardian, and a decree rendered therein directing him to pay over a sum found remaining in his hands, are admis-

<sup>1</sup> Peirce v. Whittemore, 8 Mass. 282; Thomson v. Searcy, 6 Port. 393; Fairfax v. Fairfax, 5 Cranch, 19; Sturdivant v. Raines, 1 Leigh, 481; Burnett v. Harwell, 3 id. 89; Gardner v. Vidal, 6 Rand. 106; Miller v. Gill, 4 Ala. 359; Seat v. Cannon, 1 Humph. 471; Gordon v. State, 11 Ark. 12; Calla v. Patterson, 18 B. Mon. 201; Daws v. Shea, 15 Mass. 6; Inglehart v. State, 2 Gill & J. 235; People v. Summers, 16 Ill. 173; Warren v. Powers, 5 Conn. 373; Willey v. Paulk, 6 id. 74; People v. Randolph, 24 Ill. 324; State v. Campbell, 10 Mo. 724; Strong v. White, 19 Conn. 238; Hobbs v. Middleton, 1 J. J. Marsh. 176; Smith v. Fagan, 2 Dev. 292; Chairman v. Moore, 2 Murph. 22; Ordinary v. Bracey, 2 Bay, 542; People v. Dunlap, 13 Johns. 437; Gookin v. Hoyt, 3 N. H. 392; O'Connor v. Such, 9 Bosw. 318.

<sup>2</sup> Ralston v. Wood, 15 Ill. 159;

State v. Bennett, 24 Ind. 383; Jackson v. Justices, 2 Bibb, 292; State v. Ruggles, 20 Mo. 99; Judge v. Looney, 2 Stew. & Port. 70; Judge v. Emery, 6 N. H. 141; Judge v. Coulter, 3 Stew. & Port. 348.

Where the personal estate of an intestate consisted of slaves, it was held in an action upon the administration bond by a distributee that the plaintiff could not recover both the appraised value of the slaves and their increase and hire from the time of granting the letters, or the appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing the action, and the pleadings must disclose which course he elects to take. Burch v. State, 4 Gill & J. 444.

<sup>3</sup> Gordon v. Clapp, 5 Vt. 129.

<sup>4</sup> Id.

sible in evidence against the sureties, although they were not parties to the same. Such a decree is equally conclusive upon the principal and his sureties; and upon the refusal of the former to obey the same the liability of the sureties attaches; they cannot go behind the decree to inquire into the merits of the matter therein passed on unless they can show that it was obtained by fraud or collusion.<sup>1</sup> As a general rule sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense but administration bonds form an exception to this rule.<sup>2</sup>

The principle that sureties are generally liable only for such assets as may have come to their principal's possession or which might have been reduced to possession by the exercise of due diligence does not obtain where he owes a debt in his individual capacity to the estate he represents. In such a case the right to demand and the obligation to pay co-exist in him, and the law presumes instantaneous payment and extinguishment of the debt on the qualification of the representative. The sureties in such a case are conclusively liable for the debt.<sup>3</sup> This rule rests wholly on technical grounds, and will not be extended so as to work injustice to sureties. Hence they will not be so liable beyond the ability of their principal to pay his debt to the estate. By signing the bond the sureties have aided him to get possession of assets from his indebtedness only to the extent of his ability to pay it. If in such a case the executor accounts to the probate court for his debt, and distribution is therein decreed accordingly, a court of equity will grant the sureties relief.<sup>4</sup>

**§ 496. Guardian's bond.** A surety upon a bond given by a guardian for managing the whole estate of the ward is lia-

<sup>1</sup> *Irwin v. Backus*, 25 Cal. 214; *Slagle v. Entekin*, 44 Ohio St. 637; *Braiden v. Mercer*, id. 339; *Shepard v. Pebbles*, 38 Wis. 373; *Scofield v. Churchill*, 72 N. Y. 565; *Knox v. Kearns*, 73 Iowa, 286; *Knepper v. Glenn*, id. 730; *Stovall v. Banks*, 10 Wall. 583; *Harrison v. Clark*, 87 N. Y. 572.

<sup>2</sup> *Id.*

<sup>3</sup> *Wright v. Lang*, 66 Ala. 389; *Seawell v. Buckley's Distributees*, 54 id. 592; *Choate v. Thorndike*, 138 Mass. 371; *Probate Court v. Merriam*, 8 Vt. 234.

<sup>4</sup> *Lyon v. Osgood*, 58 Vt. 707; *Garber v. Commonwealth*, 7 Pa. St. 265; *Piper's Estate*, 15 id. 533; *Gottsberger v. Smith*, 5 Duer, 566; *Harker v. Irick*, 10 N. J. Eq. 269.

ble for all money in the hands of the guardian belonging to the ward, whether received before or after the undertaking.<sup>1</sup> It includes property of the ward received by him in another state.<sup>2</sup> It is not limited to such as was owned by the ward at the time the bond was executed, but extends to that subsequently acquired which came into the guardian's hands.<sup>3</sup> An action at law, however, cannot be maintained before the accounts have been adjusted and a specific sum decreed to be paid over.<sup>4</sup> Nor can a guardian's sureties be made liable [42] for work done for him by the ward.<sup>5</sup> In actions upon the bond the recovery is measured by the actual injury;<sup>6</sup> and where there is merely a technical breach of the condition, but no loss, only nominal damages can be recovered.<sup>7</sup> If the breach consists in the conversion of a chose in action the sum

<sup>1</sup> *McDowell v. Caldwell*, 2 *McCord* Ch. 43; *Merrells v. Phelps*, 34 *Conn.* 109; *Ammons v. People*, 11 *Ill.* 6.

In *Bockenstedt v. Perkins*, 73 *Iowa*, 23, the only evidence as to the possession of the money by the guardian when the bond was executed was that it had been received by him six days prior to that time. The court refused to set aside a judgment against the sureties on the ground that it was not sustained by the proof.

<sup>2</sup> *McDonald v. Meadows*, 1 *Met. (Ky.)* 507.

There is a tendency in some decisions to limit the liability of the sureties of personal representatives to assets within the state of their appointment. *Keaton v. Campbell*, 2 *Humph.* 224; *Snodgrass v. Snodgrass*, 1 *Baxter*, 157. The same rule was assumed to be applicable to a guardian's sureties *Andrews' Heirs*, 3 *Humph.* 592. It is said that there are grave difficulties in holding, as a general proposition, that the sureties of a guardian whose bond has been made with reference to the estate of the ward in one state may also be held liable for an equal amount of

assets brought from another state, thus covering the entire penalty which the statute only requires to be in double the value of the estate. *Pearson v. Dailey*, 7 *Lea (Tenn.)*, 674. In the case last referred to the ward's estate consisted wholly of a fund in the hands of a guardian in another state, which the domestic guardian obtained possession of through the court which appointed him, and the receipt of which he acknowledged in his report. His sureties were held liable for it. See *Brooks v. Tobin*, 135 *Mass.* 69.

<sup>3</sup> *Gray v. Brown*, 1 *Rich.* 351.

<sup>4</sup> *Anderson v. Maddox*, 3 *McCord*, 237; *State v. Strange*, 1 *Ind.* 538; *Hunt v. White*, 1 *Ind.* 105; *Barrett v. Monroe*, 4 *Dev. & Bat. L.* 194; *Stilwell v. Mills*, 19 *Johns.* 304; *Salisbury v. Van Hoesen*, 3 *Hill*, 77; *Probate Court v. Slason*, 23 *Vt.* 306. Otherwise in Tennessee. *Justices v. Willis*, 3 *Yerg.* 461; *Foster v. Maxey*, 6 *Yerg.* 224. See *Call v. Ruffin*, 1 *Call (Va.)*, 333.

<sup>5</sup> *Phillips v. Davis*, 2 *Sneed*, 520.

<sup>6</sup> *State v. Murray*, 24 *Md.* 310.

<sup>7</sup> *Fuller v. Wing*, 17 *Me.* 222; *Buchanan v. State*, 106 *Ind.* 251.



apparently due upon it is *prima facie* the damages;<sup>1</sup> and if it consists in the failure to account on the ward's attaining his majority and it is not shown that the guardian received interest, the recovery, as against the sureties, is the sum due with simple interest; and in the discretion of the court, the penalty prescribed by statute; exemplary damages cannot be awarded.<sup>2</sup> If one bond is given to secure three wards the recovery thereon must be limited to the amounts proportionately due those who are plaintiffs.<sup>3</sup> In Indiana the recovery in an action by one of the parties interested must be for the entire existing liability; the amount collected is brought into court for distribution.<sup>4</sup> In no case can the damages exceed the penalty of the bond,<sup>5</sup> except in jurisdictions where interest is allowed.<sup>6</sup>

**§ 497. Mitigation of damages.** Where the father or mother of a ward is called to account as guardian the general rule is that the sureties upon the bond cannot claim an allowance out of the ward's estate for his support, if the parent was able to maintain him. The law imposes that duty upon parents.<sup>7</sup> If the ward's estate is small and the father never made any charge for his support, the sureties on the bond cannot be granted an allowance on account of it.<sup>8</sup> Neither will such an allowance be made in the absence of proof that the father was unable to support the ward, where he had the benefit of his labor.<sup>9</sup> Courts, "however, will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper."<sup>10</sup> But when the application is made on behalf of a

<sup>1</sup> State v. Berning, 74 Mo. 87.

<sup>2</sup> Peelle v. State, 118 Ind. 512.

<sup>3</sup> Knox v. Kearns, 73 Iowa, 286; Hooks v. Evans, 68 id. 52; Edmonds v. Edmonds, 73 id. 427.

<sup>4</sup> Moody v. State, 84 Ind. 493.

<sup>5</sup> Woods v. Commonwealth, 8 B. Mon. 112.

<sup>6</sup> See § 477.

<sup>7</sup> Guion v. Guion, 16 Mo. 48; Cummings v. Cummings, 8 Watts, 366;

Presley v. Davis, 7 Rich. Eq. 195; Edwards v. Durgen, 19 Grant's Ch. (Up. Can.) 101; Martin v. Foster, 38 Ala. 688.

<sup>8</sup> Walling's Case, 35 N. J. Eq. 105; Pratt v. McJunkin, 4 Rich. 5; Myers v. Appleton, 45 Ind. 160.

<sup>9</sup> Wilson's Case, 38 N. J. Eq. 205.

<sup>10</sup> Evans v. Pearce, 15 Gratt. 513; Dawes v. Howard, 4 Mass. 97.

parent who was guardian *de facto* it must be made before the guardianship terminated, otherwise it will not be granted without the clearest proof that justice requires it.<sup>1</sup> If the person who is guardian is not charged by law with the duty of supporting his ward he cannot waive his right to charge therefor to the damage of the sureties on his bond.<sup>2</sup> If an executor or administrator has been guilty of a flagrant breach of his trust, the commissions which would otherwise have been due him will not be allowed his sureties in mitigation of their liability.<sup>3</sup> If a joint bond has been given by administrators for the faithful administration of the estate that may come to their hands, and all the personal property of the decedent has been possessed by them, and one of them has committed waste after the other's death, the surety on their bond may have the estates of both exhausted before he can be made to answer for the wrong-doing of the survivor.<sup>4</sup>

§ 498. **Liability as between sets of sureties.** As has been shown, the liabilities of sureties on official bonds are limited to the term for which their principal was elected or appointed.<sup>5</sup> There is a marked distinction in this respect between such bonds and those given by executors, administrators and guardians. The distinction rests on the fact, aside from the difference in the language of the instruments, that public officers hold for designated terms, while the principals in probate bonds exercise their functions from the commencement until the close of the administration; and in guardian's bonds until the ward reaches his majority; there are no terms. When a new bond is given there is no new commitment of the estate to their hands, nor is there any settlement or rest made in their accounts.<sup>6</sup> When a guardian gives an additional bond as further security, pursuant to an order of the probate court, the sureties thereon are liable for the failure of their principal to account for money on hand at the time it was executed. Nothing appearing to the contrary, except the insolvency of the guardian, the presumption is that there had been no misappropriation of moneys previously received, and that they

<sup>1</sup> Evans v. Pearce, 15 Gratt. 513.

<sup>5</sup> § 480.

<sup>2</sup> Hauser v. King, 76 Va. 731.

<sup>6</sup> Scofield v. Churchill, 72 N. Y. 565;

<sup>3</sup> State v. Berning, 74 Mo. 87, 100.

Beard v. Roth, 35 Fed. Rep. 397.

<sup>4</sup> Eckert v. Myers, 45 Ohio St. 525.

were in his possession when such bond was given.<sup>1</sup> If such a bond is conditioned for the faithful execution of the trust, "and also to obey all orders of the surrogate touching the estate committed," the sureties are liable for the failure of their principal to obey an order as to the payment of money which came to his possession before their obligation was assumed, although the money was previously lost or disposed of.<sup>2</sup> Such a bond is cumulative without regard to the time it was executed.<sup>3</sup> The same liability attaches to the sureties of an executor under a new bond conditioned that he "shall administer, according to law and the will of the testatrix, all her goods, chattels, etc., which shall at any time come to the possession of the executor."<sup>4</sup> The breach in such a case occurs during the life of the second bond, the *gravamen* of the action on which is the failure to pay over according to duty.<sup>5</sup> It is not necessary that the original bond be exhausted before resort is had to the second. The former is in force and is as obligatory upon its makers as if no other had been given. A creditor or other person interested in the estate may sue upon either if the wrong complained of was a breach of both.<sup>6</sup> In South Carolina and Tennessee the second bond is the primary security, and the first is at least suspended until the other is exhausted.<sup>7</sup> This is the rule in South Carolina although only

<sup>1</sup> Clark v. Wilkinson, 69 Wis. 543; Whitworth's Distributees v. Oliver, 39 Ala. 286; Choate v. Arrington, 116 Mass. 552.

<sup>2</sup> Scofield v. Churchill, 72 N. Y. 565.

<sup>3</sup> Lacoste v. Spivalo, 64 Cal. 35.

<sup>4</sup> Foster v. Wise, 46 Ohio St. 20; Brown v. State, 23 Kan. 235; Pinkstaff v. People, 59 Ill. 148.

<sup>5</sup> Pinkstaff v. People, 59 Ill. 148.

<sup>6</sup> Ibid.

<sup>7</sup> Glenn v. Wallace, 4 Strobb. Eq. 150; Bobo v. Vaiden, 20 S. C. 271; Morris v. Morris, 9 Heisk. (Tenn.) 814, 822.

The Tennessee statute provides: "Every guardian, at the time of exhibiting his biennial list or statement of his ward's estate, shall renew his bond in a penalty of double the value

of the estate, with the same conditions as the original bond." § 2499. The sureties on a renewed guardian's bond are liable before those on a former bond, although the guardian misappropriated the ward's money prior to the execution of the last bond. Crook v. Hudson, 4 Lea. 448. The same rule applies to new sureties given by way of substitution for former sureties released according to law. Crawford v. Penn, 1 Swan, 388. And to new sureties given by way of counter-security. Steele v. Reese, 1 Yerg. 263. If the new security is given pursuant to an order of court requiring other or better security, the two sets of sureties are equally liable. McGlothlin v. Wyatt, 1 Lea, 717.

one of the sureties on the first bond petitioned for relief from liability, and for a new bond, unless some act of such surety led the sureties on the second bond to believe that the sum in the administrator's hands was less than it in fact was, in which case the primary liability for the difference between the amount actually on hand and that which was represented will be on the original bond.<sup>1</sup> If the second bondsmen prove insufficient the first are responsible up to the date of their release; the former must account, first, for any default after their bond was given, and then for such as accrued prior thereto.<sup>2</sup> It is provided by statute in Missouri that when an additional bond is given and approved "it shall discharge the former securities from any liability arising from any misconduct of the principal after the filing of the same, and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond." Where the assets of the estate were pledged by the administrator for his own purposes, while the original bond was the only security for his conduct, the fact that after another bond was given he failed to recover the pledged securities did not operate to shift the resulting loss wholly upon the sureties on the latter; both sets were liable.<sup>3</sup> Under a statute which provides that the discharged surety "shall only be liable for such misconduct as happened prior to giving the new bond," one who has been discharged is not responsible for moneys found due the estate on a settlement made subsequent thereto unless it is shown that the wrong was done before the discharge.<sup>4</sup> The demand upon the discharged surety need not be made before a new bond is given.<sup>5</sup> Independently of statute, new sureties on a guardian's bond are liable for so much money as he might have collected on a loan made before they became such.<sup>6</sup> And so if a new bond is filed by order of the court, the guardian not being discharged or re-appointed nor the sureties on the first bond being released, and the evidence fails to show whether the money previously received had been misappro-

<sup>1</sup> *Bobo v. Vaiden*, 20 S. C. 271.

<sup>4</sup> *Beard v. Roth*, 35 Fed. Rep. 397.

<sup>2</sup> *Morris v. Morris*, 9 Heisk. (Tenn.) 814, 822.

<sup>5</sup> *Conover's Case*, 35 N. J. Eq. 108.

<sup>3</sup> *State v. Berning*, 74 Mo. 87; *Wolff v. Schaeffer*, id. 154.

<sup>6</sup> *McWilliams v. Norfleet*, 63 Miss. 183; *Rader v. Yeargin*, 85 Tenn. 486.



priated or not, the new security will be cumulative for the whole term.<sup>1</sup> If the bond is conditioned that the guardian will pay all moneys which may come into his hands or possession and faithfully discharge the office and trust of guardian according to law, the sureties on an additional bond will be liable to pay the whole amount ordered to be paid though it had been wrongfully expended before their obligation was given.<sup>2</sup> If an administrator resigns and afterwards succeeds himself and a balance is found due from him on the settlement of the first administration, the distributees may charge the sureties on either bond.<sup>3</sup> If sureties have been discharged and a new bond has been accepted and there was a breach of the first bond before their discharge by the administrator's neglect to render his account, the original sureties are not subject to the statutory rule of damages which makes them liable for the full value of the property in his hands if the appropriation was not made before they were discharged; their liability is for nominal damages, or such as resulted from his neglect. If the property of the estate was lying idle and unproductive, interest during the period of such delay is the measure of damages.<sup>4</sup> In Indiana the liability of the sureties on a new bond is prospective only.<sup>5</sup> But if it appears that money received while the first bond was in force was on hand when the second was given, the sureties on the latter are liable for it.<sup>6</sup> A guardian who has resigned and been re-appointed in another county, where he gives a new bond and charges himself with the amount received under his first appointment, does not thereby release his original sureties from liability for a defalcation committed while their bond was in force.<sup>7</sup> An involuntary payment made on behalf of a guardian who committed a breach of trust under two bonds will be applied *pro rata* upon the liability under both, although the sureties upon one of them have become insolvent.<sup>8</sup>

<sup>1</sup> Douglass v. Kessler, 57 Iowa, 63; Loring v. Baker, 3 Cush. 465; Bell v. Jasper, 2 Ired. Eq. 597; Jones v. Blanton, 6 id. 115.

<sup>2</sup> Knox v. Kearns, 73 Iowa, 286.

<sup>3</sup> Modawell v. Hudson, 80 Ala. 265.

<sup>4</sup> McKim v. Bartlett, 129 Mass. 226.

<sup>5</sup> Lowry v. State, 64 Ind. 421; State

v. Page, 63 id. 209; Parker v. Medsker, 80 id. 155; State v. Homer, 121 id. 92.

<sup>6</sup> Parker v. Medsker, 80 Ind. 155.

<sup>7</sup> Yost v. State, 80 Ind. 350; Naugle v. State, 101 id. 284.

<sup>8</sup> Bond v. Armstrong, 88 Ind. 65.

There is ample authority and reason for saying that when the law provides for a special bond as security for the performance of a special duty imposed upon any officer the sureties upon his general bond are relieved from liability for the discharge of that duty unless it is clear from the law that such was not the intention.<sup>1</sup> It is provided in the statutes of many states that when the real estate of a ward is to be sold the guardian shall give an additional bond to secure the proper application of the proceeds. If such a statute is mandatory it may be said with the best of reasons that the sureties in the general bond did not contemplate that they were assuming responsibility for money coming to their principal's hands from that source, and that whether such a bond was given or not they are not responsible for funds so received.<sup>2</sup> In Florida the statutory requirement is that the county judge shall require such security from guardians as is necessary: he may authorize a sale of the real estate of minors and shall require "such additional bond as in his discretion may seem to be necessary to protect the interests of the infant." A bond so given is subsidiary and auxiliary to the general bond and cannot be sued until the latter is exhausted.<sup>3</sup> The same rule has been declared as to administrators in Indiana,<sup>4</sup> Alabama,<sup>5</sup> Ohio<sup>6</sup> (under a discretionary statute), and in Pennsylvania under a mandatory one.<sup>7</sup> If part of the funds with which a guardian is charged are the proceeds of real estate and one who had been his surety upon both his general and special bonds has been discharged from liability and a new bond has been executed by order of the court, the last covers liability for all money in the guardian's hands when it was executed.<sup>8</sup>

<sup>1</sup> § 481.

<sup>2</sup> *Madison Co. v. Johnston*, 51 Iowa, 152; *Bunce v. Bunce*, 65 id. 106; *Morris v. Cooper*, 35 Kan. 156; *Lyman v. Conkey*, 1 Met. 317; *Williams v. Morton*, 38 Me. 47; *Warwick v. State*, 5 Ind. 350; *Lowry v. State*, 64 id. 421; *Hannum v. Day*, 105 Mass. 33, 38.

<sup>3</sup> *Hart v. Stribling*, 21 Fla. 136.

<sup>4</sup> *Salyer v. State*, 5 Ind. 202; *Salyers v. Ross*, 15 id. 130.

<sup>5</sup> *Clarke v. West*, 5 Ala. 117.

<sup>6</sup> *Wade v. Graham*, 4 Ohio, 126.

<sup>7</sup> *Commonwealth v. Loyd*, 12 Phila. 221.

<sup>8</sup> *Moody v. State*, 84 Ind. 433.

## SECTION 5.

## REPLEVIN BONDS.

§ 499. **Their original conditions.** The English statute enacted nearly six hundred years ago provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiff pledges for the pursuing of the suit before they make deliverance of the distress, but also for the return of the beasts if return be awarded.<sup>1</sup> The statute of George II. was intended rather as an improvement and modification of the old security than as the creation of a new one.<sup>2</sup> This required a bond with two sureties in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning goods and chattels distrained in case a return should be awarded.<sup>3</sup> Though framed for exclusive application to replevin on distress for rent, as were some early American statutes, it was the foundation of the practice in other cases. These conditions have always been treated as independent, and if either was not complied with the bond [43] was forfeited.<sup>4</sup> The condition to prosecute the suit to effect and without delay has been uniformly interpreted to mean a continuous prosecution to a final judgment in favor of the plaintiff; he must diligently pursue the case and succeed.<sup>5</sup>

<sup>1</sup> West. 2, ch. 2; Edw. 1.

<sup>2</sup> Morris on Rep. 267.

<sup>3</sup> 11 Geo. 2, ch. 19, § 23.

<sup>4</sup> Moore v. Bowmaker, 7 Taunt. 97; Perreau v. Bevan, 5 B. & C. 284; Balsley v. Hoffman, 13 Pa. St. 603; Smith v. Newton, 38 Ill. 228; Lomme v. Sweeney, 1 Mont. 584; Morris on Rep. 250; Dunbar v. Dunn, 10 Price, 542; Whitman v. Jones, 5 N. H. 362; Gibbs v. Bartlett, 2 W. & S. 29; Neville v. Williams, 7 Watts, 421; Short v. Hubbard, 2 Bing. 348; Thomas v. Irwin, 90 Ind. 557; Vinyard v. Barnes, 124 Ill. 346; Parrott v. Scott, 6 Mont. 340; Boom v. St. Paul F. & M. Co., 33 Minn. 253; Imel v. Van Deren, 8 Colo. 90; Pittsburgh Nat.

Bank v. Hall, 107 Pa. St. 583; Elliott v. Black, 45 Mo. 372; Gardiner v. McDermott, 12 R. I. 206.

In New Hampshire and Ohio a judgment for return seems never to have been a feature of the practice in replevin, and the bond contains no such condition. Bell v. Bartlett, 7 N. H. 178; Smith v. McGregor, 10 Ohio St. 461.

<sup>5</sup> Turnor v. Turner, 2 Brod. & B. 107; Crabbs v. Koontz, 69 Md. 59; Boom v. St. Paul F. & M. Co., 33 Minn. 253; Meigs v. Keach, 1 Wash. Ty. 305; Perreau v. Bevan, 5 B. & C. 284; Axford v. Perrett, 4 Bing. 586; Harrison v. Woodle, 5 B. & Ad. 146; Harrison v. Montstephen, 2

It is not a condition the performance of which is in itself beneficial to the party for whose benefit the bond is made. But the recovery of a final judgment in favor of the plaintiff makes it clear that, when the property was delivered to him at the commencement of the action, he received his own, and no wrong was done the defendant. His bond is a penal undertaking to establish at as early a day as practicable that he had a right to possession when he obtained the writ. If he fails to do so, it appears clearly that the possession which the plaintiff acquired by process based on the bond was wrongful and injurious to the defendant to the extent of his interest in the property, and the costs to which he has been subjected in asserting that interest. On failure to fulfill the conditions the penalty of the bond is forfeited, and relief is granted against a demand of the whole only on the terms of making equitable compensation according to the injury caused to the defendant by the process by which he was deprived of possession. This compensation is only limited by the penalty of the bond; within that limit the plaintiff is entitled to the value of the property and costs of the replevin suit.<sup>1</sup> And the liability of the sheriff for taking insufficient bail, or for other official [44] neglect, resulting in a loss of the security of the replevin bond, is governed by the same standard and subject to the same limitations.<sup>2</sup> But if the party for whose benefit the bond is

Dow. & Ry. 343; Balsley v. Hoffman, 13 Pa. St. 603; Morgan v. Griffith, 7 Mod. 380; Dias v. Freeman, 5 T. R. 195; Brown v. Parker, 5 Blackf. 291; Gould v. Wenner, 3 Wend. 54; Jackson v. Hanson, 8 M. & W. 477; Phillips v. Price, 3 M. & S. 183; Persse v. Watrous, 30 Conn. 139; Lindsay v. Blood, 2 Mass. 518; Sevey v. Blacklin, id. 543.

It is held, though by a divided court, the better reasons being given by the dissenting judge, that the defendant's remedy for a breach of the bond in failing to prosecute the suit is not waived by his consenting to a dismissal of the action merely. Hall v. Smith, 10 Iowa, 45. But a settlement of the matter in dispute and a

dismissal of the action pursuant to it bars a suit on the bond. Gerard v. Dill, 96 Ind. 101.

<sup>1</sup> Branscombe v. Scarborough, 6 Q. B. 13; Gainsford v. Griffith, 1 Williams' Saund. 53, n. 1; Hunt v. Round, 2 Dow. P. C. 558; Ward v. Henley, 1 Y. & J. 285; Hefford v. Alger, 1 Taunt. 218; Gould v. Wenner, 3 Wend. 54; Gibbs v. Bartlett, 2 W. & S. 33; McCabe v. Morehead, 1 id. 513; Arnold v. Bailey, 8 Mass. 145; Fraser v. Little, 13 Mich. 195; Balsley v. Hoffman, 13 Pa. St. 603.

<sup>2</sup> Evans v. Brandon, 2 H. Bl. 548; Baker v. Garratt, 3 Bing. 56; Jeffrey v. Barnard, 4 A. & E. 823; Paul v. Goodluck, 2 Bing. N. C. 220; Murdoch v. Will, 1 Dall. 341.



made be entitled to only the possession of the property, the title being in the opposite party, such obligee is not entitled to recover the value of the property, but only of his possessory right.<sup>1</sup>

§ 500. **The condition for return of property.** As replevin is a form of action to enable a plaintiff to recover specific personal property, if he fails to maintain his right to the possession after it has been delivered to him, there is fairness and equality in allowing a defendant at least an election to have it restored. Accordingly, instead of leaving to him a mere claim of damages, assessable on the broken condition to prosecute to effect, the law has wisely provided for a judgment of return as well as a specific condition to the same effect in the bond. Such judgment imposes the duty on the plaintiff to restore the property; and if not complied with the condition for such return, when adjudged, is also violated. If the plaintiff does not voluntarily execute the judgment for return the defendant may, but is not obliged to avail himself of the writ of return to compel its execution. He may at once sue on the bond, unless a preliminary resort to the writ is required by statute.<sup>2</sup>

This provision for return of the same goods and chattels is intended for the benefit of the defendant.<sup>3</sup> Thus construed, according to the import of the transaction of which the bond is a part, it is an indirect undertaking by the plaintiff, in consideration of being able of his own motion to get possession of the property in dispute at once, to return it if return be adjudged, and to pay the defendant from whom he has wrested [45] it such sum as ought to be assessed for damages by reason of the premises, if he neglects to prosecute the suit, or it appears by an adverse judgment that he was not entitled to the property. Any such default is an event on the happening of which he in form acknowledges himself bound to pay the penalty, but as the court will not allow the obligee to

<sup>1</sup> *Hawley v. Warner*, 12 Iowa, 42. See *Buck v. Rhodes*, 11 id. 348; *Hayden v. Anderson*, 17 id. 158; *Smith v. Whiting*, 100 Mass. 122; *Schweer v. Schwabacher*, 17 Ill. App. 78; *Crabbs v. Koontz*, 69 Md. 59.

<sup>2</sup> *Wright v. Quirk*, 105 Mass. 44; *Turnor v. Turner*, 2 Brod. & B. 107; *Sevey v. Blacklin*, 2 Mass. 541. See as to the practice in Missouri, *Morrison v. Yancey*, 23 Mo. App. 670.

<sup>3</sup> *Gibbs v. Bartlett*, 2 W. & S. 33.

take more than in conscience he ought, damages assessed for the breaches are made to embrace the full redress to which such defendant, secured by such bond, is entitled.<sup>1</sup> The act of 11 George II. contained a clause that the court where such action shall be brought may by rule give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance of the bond.<sup>2</sup>

§ 501. **The condition required by modern statutes.** Modern legislation on this subject has the merit of prescribing substantially equivalent conditions which are more precise and direct. In some, if not in most, of the states there are three conditions: first, to prosecute the suit to effect or to final judgment; second, to return the property if return be adjudged; and third, to pay such sum as the defendant may recover judgment for in the replevin suit. The action for breach of the condition to prosecute to final judgment proceeds in the absence of any determination of the merits of the replevin suit, and for failure to prosecute to judgment; but the breach of the condition to prosecute to effect, as we have seen, may consist not only of such neglect, but also of an adverse judgment on the merits.<sup>3</sup>

<sup>1</sup> Wright v. Quirk, 105 Mass. 44.

<sup>2</sup> Turnor v. Turner, 2 Brod. & B. 107.

<sup>3</sup> The legal effect of the dismissal of the suit is a judgment of restitution. If that cannot be had, the defendant is entitled to a *feri facias* for the value of the property. He is not forced to bring an action on the bond. Marshall v. Livingston, 77 Ga. 21.

failure to prosecute, he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained." Persse v. Watrous, 30 Conn. 139; Ladd v. Prentice, 14 Conn. 109.

In Mills v. Gleason, 21 Cal. 274, Cope, J., said: "A dismissal stands on the same footing as a nonsuit, leaving the parties to settle in an action upon the undertaking those matters which, if the suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right of the defendant to a return of the property; and as the opportunity to obtain a return is taken away by the

Where there is a breach of the condition to prosecute to effect and no judgment is entered for the return of the property, an officer who is defendant and has a special interest in or title to the property is entitled to retain the custody of it; but in the absence of an order awarding him such custody, he must affirmatively show in an action on the bond that the demand upon which he acquired possession of the property has not been satisfied, otherwise it can-

[46] The bond is intended to give the defendant in replevin complete indemnity for the property being taken out of his possession; and for the necessity imposed of active measures for the defense of his right to it. He is not entitled to indemnity if he had no title or right of possession, and the possession is taken by one who has the right; and he can recover nothing beyond costs and nominal damages, even if the plaintiff fails to prosecute. And where the suit is prosecuted to judgment, if the defendant recovers, and the plaintiff performs the judgment, the bond is satisfied.<sup>1</sup> The purpose of indemnity is accomplished, if, when the defendant succeeds in the replevin suit, whether it is tried on the merits or not, the property is returned to him, the damages paid, whether they arise from deprivation of the use, deterioration, or decrease of market value, and the costs incident to making a defense. Where these damages have not been, and could not be, determined in the replevin suit, they may be determined in the action on the bond if there is a breach of either of the conditions. There is no breach of the condition to prosecute to final judgment if the case is tried on the merits, though judgment be rendered for the defendant; then, if the other conditions are fulfilled by performance or execution of the judgment, the bond is satisfied. But the recovery of judgment by the defendant, whether on the merits or not, as well as the neglect of the plaintiff to prosecute the replevin suit with diligence, is a breach of the condition to prosecute to effect, and then the defendant may sue on the bond and rely on the breach, although in the former case the condition to return when adjudged may also be broken.<sup>2</sup>

§ 502. **Damages need not be assessed in replevin suit.** The obligee is entitled to recover the damages for the taking [47] and detention in the action on the bond. The omission

not be determined how or to what extent he has been damnified. *Imel v. Van Deren*, 8 Colo. 90. 6 Minn. 412; *Balsley v. Hoffman*, 13 Pa. St. 603; *Ginaca v. Atwood*, 8 Cal. 446.

<sup>1</sup> *Chambers v. Waters*, 7 Cal. 390; *Pettygrove v. Hoyt*, 11 Me. 66; *Hovey v. Coy*, 17 Me. 266; *Smallwood v. Norton*, 21 Me. 83; *Millett v. Hayford*, 1 Wis. 401; *Claggett v. Richards*, 45 N. H. 360; *Clark v. Norton*, 2 Brown v. Parker, 5 Blackf. 291; *Gibbs v. Bartlett*, 2 W. & S. 33; *Roman v. Stratton*, 2 Bibb, 199. But compare *Wall v. Humphries*, 4 Dana, 209.

of the defendant in the replevin suit to have the damages assessed in that action, he being at liberty to have them there assessed, is no renunciation of them if the judgment there rendered remains unsatisfied. And this rule has been applied when the only breach assigned was of the condition to return the property if adjudged. For it is said the statute contemplates that the property will be returned when such is the judgment, and the damages are then assessed upon that expectation. But where it is not returned, and there is a breach of the bond, the statute does not prescribe how the damages shall be assessed. The general rule of law would give in such a case as an indemnity the value of the property at the time it was taken, and interest from that time to the time of trial.<sup>1</sup> If the defendant's damages are assessed in the replevin suit, he may in a subsequent action on the bond recover such as resulted from the failure to return the property.<sup>2</sup> Where the

<sup>1</sup> Manning v. Manning, 26 Kan. 98; Treman v. Morris, 9 Ill. App. 237; Yelton v. Slinkard, 85 Ind. 190; Smith v. Dillingham, 33 Me. 384; Thomas v. Spofford, 46 Me. 408; Tuck v. Moses, 58 Me. 461; Washington Ice Co. v. Webster, 62 Me. 341; Hall v. Smith, 10 Iowa, 45. Compare Swift v. Barnes, 16 Pick. 194.

If the statutory damages are recovered the defendant cannot recover interest upon the value of the property. Treman v. Morris, *supra*.

<sup>2</sup> The statute of Maine provides that "if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs." It was contended that the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that if the defendant in replevin recovers judgment for a return, he may, at his election, have the damages which he has sustained by reason of the taking and detention of them to the time of such judgment assessed in

the replevin suit, or he may recover them in a suit on the bond, but cannot pursue both remedies; that if he elects, as he did in this case, to have the assessment made in the replevin suit, he cannot in a subsequent suit on the bond, founded on a failure to return the goods, recover any damages which accrued prior to the judgment in the replevin action, and therefore cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return. In answer the court said: "This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle. By the terms of the bond it was made enforceable against the principal and sureties if the principal should not pay such damages and costs as W. should recover against it, and should not also return and restore the goods replevied in like order and condition as when taken. Under the condition of the bond the sureties were liable to pay the damage recovered against the principal in case the



plaintiff neglects to prosecute his action, there is a difference of opinion concerning the defendant's remedy. In Rhode Island it is held that he is not required to make complaint and obtain judgment for the return of the property before bringing a suit on the bond. The purpose of the bond is not merely to secure to the defendant the execution of the judgment which he may recover, but rather as an indemnity to him for taking the property out of his possession.<sup>1</sup> It is held by the federal supreme court that the defendants in a suit on the bond cannot avail themselves of the omission of the trial court to render the alternative judgment provided for by statute, for the return of the property or its value.<sup>2</sup> In Maine and Vermont the rule is contrary to that which prevails in Rhode Island.<sup>3</sup>

**§ 503. When sureties not liable for judgment in replevin suit.** If there be no condition to pay any judgment that may be recovered in the replevin suit, a judgment there obtained for such damages, it has been held in Illinois, is not evidence against the sureties in an action on the bond. The non-payment of such a judgment would be no breach of the bond; nor would it measure the damages on any breach. The surety is not a party to an assessment in such a case, and as to him it is wholly inoperative. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of return is admissible, it must be evidence of what the damages in fact were, without reference to any former assessment.<sup>4</sup> In Maine the damages recovered by an attaching officer in replevin, being recovered in trust, are not conclusive upon the sureties in a suit on the bond.<sup>5</sup> But in Pennsylvania it is held that the damages and costs for which the defendant in the replevin suit obtained judgment may be recovered on the bond.<sup>6</sup> These damages

principal had not paid them as he did. By the judgment in the present suit they are only made liable according to their obligation, that their principal shall return and restore the goods in like order and condition as when taken." *Washington Ice Co. v. Webster*, 125 U. S. 426, 437.

<sup>1</sup> *Gardiner v. McDermott*, 12 R. I. 206.

<sup>2</sup> *Sweeney v. Lomme*, 22 Wall. 208.

<sup>3</sup> *Pettygrove v. Hoyt*, 11 Me. 66; *Smallwood v. Norton*, 20 id. 83; *Col-lamer v. Page*, 35 Vt. 387.

<sup>4</sup> *Shepard v. Butterfield*, 41 Ill. 76.

<sup>5</sup> *Howe v. Handley*, 28 Me. 241.

<sup>6</sup> *Miller v. Foutz*, 2 Yeates, 418; *Balsley v. Hoffman*, 13 Pa. St. 603.

and interest, however, are not invariably the value. As was said by Mr. Justice Rogers, "it would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession [48] until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of his bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition."<sup>1</sup> Interest will compensate for delay to return mere merchandise; but if, while the owner is deprived of possession, it deteriorates by use or lapse of time, or by fall of the market, he is entitled to compensation for that loss.<sup>2</sup> If the deterioration is assessed in the action of replevin and collected or paid, it cannot again be collected on the bond.<sup>3</sup> And where the use of the property is valuable, the value of such use, rather than interest, is allowed as damages.<sup>4</sup> The plaintiff cannot claim damages for depreciation while he has possession, for he may always convert the property into money.<sup>5</sup> And undoubtedly the same principle would be applied to a defendant having possession. Damages resulting to the good will of a business cannot be recovered.<sup>6</sup>

<sup>1</sup> Gibbs v. Bartlett, 2 W. & S. 29, 34.

<sup>3</sup> Rowley v. Gibbs, 14 Johns. 385.

<sup>2</sup> Stevens v. Tuite, 104 Mass. 328; Howe v. Handley, 28 Me. 241; Parker v. Simonds, 8 Met. 211; Leighton v. Brown, 98 Mass. 515; Swift v. Barnes, 16 Pick. 194; Bank of Brighton v. Smith, 12 Allen. 243; Whitwell v. Wells, 24 Pick. 34; Crabb v. Mickle, 5 Ind. 145; Washington Ice Co. v. Webster, 62 Me. 341; Schrader v. Wolfli, 21 Ind. 238; Walls v. Johnson, 16 Ind. 374; Hopkins v. Ladd, 35 Ill. 178; Story v. O'Dea, 23 Ind. 326; Lutes v. Alpaugh, 23 N. J. L. 165; Caldwell v. West, 21 N. J. L. 411; Cohen v. State, 34 Miss. 179; Ormsbee v. Davis, 18 Conn. 555; Emerson v. Booth, 51 Barb. 40; Mattoon v. Pearce, 12 Mass. 406; Rowley v. Gibbs, 14 Johns. 385; Yelton v. Slinkard, 85 Ind. 190; Treman v. Morris, 9 Ill. App. 237; Dalby v. Campbell, 26 id. 502.

<sup>4</sup> Allen v. Fox, 51 N. Y. 562; Dorsey v. Gassaway, 2 H. & J. 402; Butler v. Mehrling, 15 Ill. 488.

In Tibbles v. O'Connor, 28 Barb. 538, it was held that the sureties were responsible not only for the costs of the suit in the trial court, but also for costs of an appeal to the general term. And in Letson v. Dodge, 61 Barb. 121, it was held that parties in an undertaking in a justice's court are responsible for the final result in the court of last resort. It is held in New Hampshire that the replevin bond prescribed by the statute does not extend to a judgment on a review of the action. Bell v. Bartlett, 7 N. H. 178.

<sup>5</sup> Gordon v. Jenny, 16 Mass. 465.

<sup>6</sup> Dalby v. Campbell, 26 Ill. App. 502.

It is the rule in Massachusetts that the party who is adjudged to return the property in controversy should, on general principles, be charged, in case of default, with its value at the date when the duty to return it attaches. If it is of less value then than when taken, the difference should be compensated in damages, and they are recoverable on the bond as a breach of its conditions.<sup>1</sup> In some courts the value of the property at the time it was taken and where it was situated, for any lawful use to which it could be put, is the measure of liability.<sup>2</sup> In Iowa the value is to be determined as of the time of the trial.<sup>3</sup>

[49] § 504. **Evidence of the value.** The value of the property is sometimes established as against the plaintiff and his sureties by permitting the obligee to put in evidence the estimate of it stated in the bond, the obligors being bound by it. The plaintiff is held bound because it is his own valuation, and the sureties, by executing the bond, admit the same.<sup>4</sup> The other party, however, is not so bound; and if the value is greater at the time when judgment for return is pronounced he may show its actual value at that time.<sup>5</sup> If the value has

<sup>1</sup> Swift v. Barnes, 16 Pick. 194; Parker v. Simonds, 8 Met. 211.

<sup>2</sup> Washington Ice Co. v. Webster, 125 U. S. 426, 443; S. C., 68 Me. 449, 462.

<sup>3</sup> Clement v. Duffy, 54 Iowa, 632.

<sup>4</sup> Washington Ice Co. v. Webster, 125 U. S. 426; Marshall v. Livingston, 77 Ga. 21; Huggeford v. Ford, 11 Pick. 223; Middleton v. Bryan, 3 M. & S. 155; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 241; Parker v. Simonds, 8 Met. 211; Gordon v. Jenny, 16 Mass. 469; Tuck v. Moses, 58 Me. 461; Washington Ice Co. v. Webster, 62 Me. 341; Leighton v. Brown, 98 Mass. 515; Wright v. Quirk, 105 Mass. 44; Gibbs v. Bartlett, 2 W. & S. 33.

<sup>5</sup> Id. In Parker v. Simonds, *supra*, Hubbard, J., referring to Swift v. Barnes, said: "In that case a quantity of sperm oil was replevied, and there was judgment for a return,

and a writ of restitution issued, and a demand was made of the property, but it was not re-delivered. The question made by the parties was whether the valuation in the bond should be the measure of damages, or whether judgment should be rendered for the actual value of the oil at the time of the service of the writ of replevin, or when the verdict was given, or on the rendition of judgment, or at the date of the demand upon the writ of restitution. The oil having risen in value after it was replevied, it was argued by the plaintiff that the value of the oil at the time of the rendition of judgment, or at the time of the demand made on the writ, was the rule to be adopted; while it was contended by the defendant that the value of the oil at the time of the original taking should determine the amount of damages, and that the circumstance that a

increased in the possession of the obligor by an advance [50] in the market price since the time of default in complying with the judgment of return the obligee is entitled to the benefit of the enhanced value.<sup>1</sup> But if the value has been increased by the labor bestowed upon it in good faith by the party who retained the possession it is otherwise.<sup>2</sup> If the bond is insufficient as a statutory obligation, but good as a common-law bond, the sheriff's appraisal of the value of the property, as evidenced by his indorsement upon the writ,

bond had been given should make no difference. The court, after a review of the authorities cited, was of opinion that the value of the property replevied, at the time it was demanded on the writ of restitution, was the true measure of damages; and Mr. Justice Wilde, who gave the opinion, referred to the general rule of damages on all contracts to deliver goods on demand, and expressed the opinion that there was no essential difference between this contract and the common one to deliver goods. And the court further held that the party who made the bond and fixed the value might well be bound by it, as was decided in *Gordon v. Jenny*, 16 Mass. 465; and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it because the property had risen in value. But a leading feature in that decision is this, namely, that the party injured was entitled to an indemnity, and could not receive it unless the actual value of the goods at the time of the demand made was adopted as the rule to fix the measure of damages. But though the court state the rule by which the damages are to be ascertained in strong and general terms, yet it does not embrace every case arising under the process of replevin; and the case at bar is one of those which are to be

excepted from its operation. The goods replevied consisted of household furniture, horses, cattle, wagons, etc., which had been more or less used. At the time of the demand some of them had been sold, and others were deteriorated and much depreciated in value by further use. They were not all of them goods, like oil or other articles of merchandise, of a current market price; and some having been sold, and others thus deteriorated, the value at the time of the demand could not be ascertained; nor would that value be the measure of damages without a proper allowance for the depreciation, which, under the circumstances of this case, could not be computed upon any accurate data. The only mode, therefore, to give the plaintiff the indemnity to which he is entitled is to take the estimate of the value as set out in the replevin bond. To this is to be added six per cent. on such value from the time of the judgment in the action of replevin. It not sufficiently appearing but that the plaintiff might have had his writ of return immediately, or have put his bond in suit, he is not entitled to the penal damages since that time." But see *West v. Caldwell*, 23 N. J. L. 736.

<sup>1</sup> *Tuck v. Moses*, 58 Me. 461.

<sup>2</sup> *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Herdic v. Young*, 55 Pa. St. 176.



is incompetent as against the sureties. Their liability must be established by evidence known to the common law.<sup>1</sup>

§ 505. **Damages recoverable.** Exclusive of the value of the goods, in default of or in place of a return, the damages secured by the bond ordinarily consist of interest upon the money value of the goods, if fixed at the time of the taking, computed up to the time of the verdict, and in addition any special damage shown to result directly from the taking.<sup>2</sup> The expenses actually incurred in procuring teams and appurtenances for the purpose of removing the property, which were rendered useless by the wrongful suing out of the replevin, may be included in such damages.<sup>3</sup> The costs of the defendant in the replevin suit for which he is liable may be recovered,<sup>4</sup> but not those made by the other party.<sup>5</sup> In Illinois there may be a recovery for attorneys' fees,<sup>6</sup> and so in Alabama;<sup>7</sup> but it is otherwise in Indiana and Kentucky as to fees paid in [51] the suit on the bond and in the replevin action.<sup>8</sup> There can be no recovery for time and money expended in procuring sureties or in attending the trial of the original action.<sup>9</sup> The recovery cannot exceed the penalty of the bond,<sup>10</sup> except in jurisdictions where interest may be recovered.<sup>11</sup> If property which has been seized on an attachment against a third person is replevied the sureties' liability is not to be measured by the value of the interest of the attachment debtor for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the bond,

<sup>1</sup> *Jacobs v. Daugherty*, 78 Texas, 682.

<sup>2</sup> *Stevens v. Tuite*, 104 Mass. 328; *Davis v. Crow*, 7 Blackf. 129.

<sup>3</sup> *Washington Ice Co. v. Webster*, 62 Me. 341.

<sup>4</sup> *Kellar v. Carr*, 119 Ind. 127; *Morrill v. Daniel*, 47 Ark. 316; *Mills v. Hackett*, 65 Texas, 580; *Carlton v. Dixon*, 14 Ore. 293.

<sup>5</sup> *Kellar v. Carr*, 119 Ind. 127.

<sup>6</sup> *Dalby v. Campbell*, 26 Ill. App. 502.

<sup>7</sup> *Miller v. Garrett*, 35 Ala. 96; *Fer-*

*guson v. Baber*, 24 id. 402; *Hudson v. Young*, 25 id. 376; *Garrett v. Logan*, 19 id. 344; *Foster v. Napier*, 74 id. 393.

<sup>8</sup> *Davis v. Crow*, 7 Blackf. 129; *Kenley v. Commonwealth*, 6 B. Mon. 583.

<sup>9</sup> *Id.*; *Foster v. Napier*, 74 Ala. 393.

<sup>10</sup> *Kellar v. Carr*, 119 Ind. 127; *Dalby v. Campbell*, 26 Ill. App. 502. See ch. 9, vol. 1.

<sup>11</sup> *Carlton v. Dixon*, 14 Ore. 293; §§ 477, 478.

are the elements to determine the damages in the suit on the bond.<sup>1</sup>

§ 506. **Effect of the judgment in replevin suit.** As has been stated, in many states the bond or undertaking is conditioned for the payment of any judgment which the defendant may recover against the plaintiff in the action of replevin. The obligors in such a bond contract specially in reference to a judgment in that action, and nothing short of full satisfaction of the judgment against the principal will satisfy it.<sup>2</sup> If there is an assessment of damages in the replevin suit, it constitutes, with the costs adjudged therein, a substantive item to be recovered in the action on the bond, and interest thereon will be computed from the date of that judgment.<sup>3</sup> Under a bond conditioned to abide by the judgment of the court the sureties are bound by a judgment confessed by their principal without their knowledge, no fraud or collusion being shown, and nothing being confessed outside the indebtedness involved in the replevin suit.<sup>4</sup> When the right of property is put in issue, and determined by final judgment, it is *res judicata*, and cannot, on general principles, be again inquired into between the same parties. And the sureties in the bond are also concluded by it when their obligation is to return the property if it is so adjudged, and to pay any judgment recovered. If, however, the right has not been tried, nor the value adjudged to the defendant, the extent of his interest and the amount he is entitled to recover on account of it are, of course, open questions in an action on the bond.<sup>5</sup> The sureties are

<sup>1</sup> Sweeney v. Lomme, 22 Wall. 208.

<sup>2</sup> Hicks v. McBride, 3 Phila. (Pa.) 377.

<sup>3</sup> Swift v. Barnes, 16 Pick. 194; Hopkins v. Ladd, 35 Ill. 178; Caldwell v. West, 21 N. J. L. 411; Washington Ice Co. v. Webster, 62 Me. 341; S. C., 125 U. S. 426; Leighton v. Brown, 98 Mass. 515; Mattoon v. Pearce, 12 Mass. 406; Ormsbee v. Davis, 18 Conn. 555.

<sup>4</sup> Bradford v. Frederick, 101 Pa. St. 445.

<sup>5</sup> Smith v. Mosby, 98 Ind. 445; McFadden v. Ross, 108 id. 512; Boom v.

St. Paul F. & M. Co., 33 Minn. 253;

Woods v. Kessler, 93 Ind. 356; Wallace v. Clark, 7 Blackf. 298.

In Warner v. Matthews, 18 Ill. 83, Skinner, J., thus discusses the effect of judgment for the defendant in replevin, rendered on the trial of an issue denying the plaintiff's title: "The judgment in the action of replevin necessarily determined that the plaintiff in that (the defendant in this action) was not entitled to the possession of the property, and that the defendant in that action (the plaintiff in this action) was entitled

represented in the replevin suit by the plaintiff therein. If the question of the value of the property was essential to the verdict they are bound by the finding, although no formal [52] issue was made concerning it.<sup>1</sup> A judgment for return, even upon a nonsuit not complied with, will sustain an action on the bond for at least nominal damages; for to that extent it is imperative and conclusive.<sup>2</sup>

§ 507. **What may be shown in defense.** And where a judgment for the value in lieu of a return, by the election of the defendant, is regularly taken; or in the alternative in case return cannot be had, it is absolute, whether rendered on the merits or not.<sup>3</sup> But a mere judgment for return without the trial of an issue of such scope as to embrace a determination of the extent or value of the defendant's interest will not preclude inquiry upon that subject in an action on the bond. In the suit thereon the obligors may avail themselves of any fact which the plaintiff in replevin is not estopped by the judgment therein from setting up, in order to limit the sum for which recovery shall be had.<sup>4</sup> The fact that the replevin suit

to a return thereof; and to that extent, and no further, are the rights of the parties concerning the property, and the ownership thereof, conclusively adjudged and determined. Whatever was in issue in that action, and essential to be found to authorize the judgment, and was in fact determined as between the parties, is *res judicata* and conclusive upon them. The defendant in that action was entitled to judgment upon either of the issues asserting property in himself, and denying the plaintiff's right; and to prove these issues on the part of the defendant it was only necessary to show that the plaintiff had not the right of possession, or that the defendant had a special interest in the property entitling him to the present possession. The general ownership of the property was not therefore necessarily determined. *Anderson v. Talcott*, 6

Ill. 365; *King v. Ramsey*, 13 Ill. 619; 1 Greenlf. Ev., § 332." *Hawley v. Warner*, 12 Iowa, 42.

<sup>1</sup> *Washington Ice Co. v. Webster*, 125 U. S. 426.

<sup>2</sup> *Buck v. Rhodes*, 11 Iowa, 348; *Hayden v. Anderson*, 17 id. 158.

<sup>3</sup> *Id.*; *Davis v. Harding*, 3 Allen, 302; *Williams v. Vail*, 9 Mich. 162; *Ryan v. Akeley*, 42 id. 216; *Pearl v. Garlock*, 61 id. 419.

<sup>4</sup> *Leonard v. Whitney*, 109 Mass. 265; *Denny v. Reynolds*, 24 Ind. 248; *Wallace v. Clark*, 7 Blackf. 298; *McKelvey v. McLean*, 34 Up. Can. C. P. 635; *Walter v. Warfield*, 2 Gill, 216; *Mason v. Sumner*, 22 Md. 312; *Ormsbee v. Davis*, 18 Conn. 555; *Pacaud v. McEwan*, 31 Up. Can. Q. B. 328; *Stockwell v. Byrne*, 22 Ind. 6; *Belt v. Worthington*, 3 Gill & J. 252; *Dugan v. Tyson*, 6 id. 458; *Cumberland Coal Co. v. Tilghman*, 13 Md. 74.

was defeated because prematurely brought;<sup>1</sup> that the plaintiff is mere trustee, representing claims not sufficient to absorb the entire value;<sup>2</sup> that he has been fully compensated for the value of the property;<sup>3</sup> that since the taking under the writ plaintiff's interest in the property has been extinguished in whole or in part;<sup>4</sup> that it has been delivered and accepted pending the suit;<sup>5</sup> that a substantial portion of the property has been tendered in the same condition in which it was when the writ issued;<sup>6</sup> that the sureties hold a mortgage upon it;<sup>7</sup> that the defendant has the title to the property, when the decision of that question was not involved in the replevin suit,<sup>8</sup> or any other fact which would show that the replevin was defeated on some technical ground, or that the defendant had but a temporary or partial right, may be shown, and the [53] amount recoverable for the value will be limited accordingly.<sup>9</sup>

<sup>1</sup> Davis v. Harding, 3 Allen, 302; Martin v. Bailey, 1 id. 381.

<sup>2</sup> Howe v. Handley, 28 Me. 241.

<sup>3</sup> Vinton v. Mansfield, 48 Conn. 474.

<sup>4</sup> Tuck v. Moses, 58 Me. 462.

Under the Illinois statute the principal in the bond can only prove property in himself in mitigation of the damages. Holler v. Coleson, 23 Ill. App. 324.

<sup>5</sup> Conroy v. Flint, 5 Cal. 327.

<sup>6</sup> Harts v. Wendell, 26 Ill. App. 274.

<sup>7</sup> Ringgenberg v. Hartman, 124 Ind. 186; McFadden v. Ross, 108 id. 512; Henry v. Ferguson, 55 Mich. 399.

<sup>8</sup> Jones v. Smith, 79 Me. 452; Crabbs v. Koontz, 69 Md. 59; Pearl v. Garlock, 61 Mich. 419; Ernst v. Hogue, 86 Ala. 502.

<sup>9</sup> Simpson v. McFarland, 18 Pick. 427; Wheeler v. Train, 4 id. 168; Flagg v. Tyler, 6 Mass. 33; Mattoon v. Pearce, 12 id. 406; Bartlett v. Kidder, 14 Gray, 449; Ware River R. v. Vibbard, 114 Mass. 458; Leonard v. Whitney, 109 id. 265; Witham v. Witham, 57 Me. 447; Walter v. Warfield, 2 Gill, 216; Hacker v. Johnson, 66 Me. 21; Hayden v. Anderson, 17 Iowa, 158; Fitzhugh v. Wiman, 9

N. Y. 559; Russell v. Butterfield, 21 Wend. 30; De Witt v. Morris, 13 id. 496; Wallace v. Clark, 7 Blackf. 298; Jackson v. Bry, 3 Ill. App. 586; Dehler v. Held, 50 Ill. 491.

In Mason v. Sumner, 22 Md. 312, Bowie, C. J., said: "The first and second exceptions raise the question of how far the judgment in the action of replevin concludes the obligors in the bond. The appellant contends that wherever the title to property is in issue, or might have been in issue, in the original proceedings, that question becomes *res adjudicata*, and cannot afterwards, in any subsequent proceedings, be inquired into; he assimilates this to a case of *sci. fa.*, where any defense which might have been pleaded to the original action cannot be set up against the *sci. fa.* In the case of Belt v. Worthington, 3 Gill & J. 252, Archer, J., declared that 'the object of the law in prescribing that a replevin bond shall be entered into by a plaintiff before he should have the benefit of the writ was only to give indemnity to the defendant. If, in truth, he had no right to the prop-



In some jurisdictions the sureties may take advantage of the neglect of the court to render the alternative judgment required by the statutes for a return of the property or its value

erty at the time of the institution of the suit, the rejection of the evidence, by putting it in his power to recover the value of the goods, would enable him to overreach a just measure of indemnity, and inflict a penalty which the law never contemplated.' Repudiating the analogies sought to be established in that case to judgments by default in actions on appeal bonds and money contracts, he said the action of replevin was '*sui generis*,—the recovery on the replevin bond ought to be moulded in such manner as will best subserve the principles of justice.

. . . The question (of the admissibility of evidence) must always be regulated by reference to the rights decided in the action and the nature and character of the bond.' In this case the obligors in the replevin were permitted, after nonsuit in replevin and judgment by default on the bond, to show, in mitigation of damages, that they had title to the articles replevied. The same general principle is announced by Stephen, J., in the case of *Dugan v. Tyson*, 6 G. & J. 458. This principle is exemplified most strongly in the case of *Walter*, for use of *Walter, v. Warfield et al.*, 2 Gill, 216, where, after judgment upon verdict rendered on pleas of *non cepit*, and property in the defendant, and judgment for return of the property in the action of replevin, upon an action on the replevin bond against the obligors, the plaintiffs in the action of replevin, as defendants in the action on the bond, were permitted to show in mitigation of damages that the property was not in the defendant in the first action and plaintiff in

the second. This case was argued before Archer, Dorsey, Chambers and Spence, JJ., and affirmed without dissent. In the more recent case of the *Cumberland Coal Co. v. Tilghman*, 13 Md. 74, the same doctrine is forcibly expressed. The theory of the action of replevin is thus defined by the learned judge, who, delivering the opinion of the court in this case, says: 'In this state the action is most *generally* resorted to for the purpose of trying the right of possession at the time of issuing the writ, and not to determine necessarily the *absolute* title to the property for all time. And this being so, it follows that if the plaintiff at the time of bringing the suit has the right to the possession, he must succeed; or, if he have it not, that his action must be defeated. Whoever is entitled to the possession, whatever may be his title in other respects, may maintain or defeat the action of replevin. His right to success in the action of replevin depending entirely on his right of possession, in reason it follows that his title to damages must be confined to the extent of interference with that possession. If the right to possession covers all time, or is limited to a determinate period, the damages will be accordingly graduated, as the case may be. In the case now before this court, the effort on the part of the defendants was to show, as alleged by them, in mitigation of damages, title in the *Cumberland Coal & Iron Co.* Now, this they could not do because that question was decided in the replevin suit. It was, however, competent to them to show that, although the defendant in the replevin suit had title to the posses-

if a return cannot be had.<sup>1</sup> There can be no recovery for a failure to return without proof of a judgment awarding it;<sup>2</sup> notwithstanding the attorneys of the parties stipulate that the property cannot be returned, the sureties may show the contrary.<sup>3</sup> The rule established by the supreme court of the United States precludes the sureties from taking advantage of the omission of the trial court to render an alternative

sion of the boat at the time of the judgment rendered in his favor, yet that title was of but short duration, and terminated by contract in a short time after that judgment. No such evidence was offered to the court below.<sup>7</sup> It is obvious from the theory and illustration given in the above extract that the judgment in replevin does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right upon which the plaintiffs in the action on the bond recovered in the replevin suit. If from these it appears that the relation between the parties to the action in replevin was that of landlord and tenant, cultivating or renting on shares, and that the subject of replevin was the crop then growing upon the farm of the landlord, such evidence shows a qualified property, or joint right of possession, which would defeat the action of replevin by the tenant, and at the same time diminish the claim of damages on the part of the landlord founded on his *prima facie* right to the value of the appraisement, showing that he was entitled to but a moiety of the same. Such evidence was proper to rebut the '*prima facie*' case of the plaintiff on the bond. His right to damages must be confined to the extent of his ownership over the property replevied. If as joint owner of the property he was entitled to such possession as precluded his tenant from replevying, and se-

cured him a judgment of *retorno habendo*, yet his title was not so absolute and entire as to entitle him to recover of the principal and surety the full value of the property, or more than the value of his share of the crops. If we are correct in these premises, it necessarily follows that the prayer offered on the part of the appellant was not proper, since it required the court to instruct the jury that the appraisement was the measure of damages; this, we have seen, was but *prima facie* evidence, subject to be rebutted by such testimony as was offered on the part of the appellee."

In *Smith v. Lisher*, 23 Ind. 500, the proceedings in the action of replevin were put in evidence, and in that action the court found "the property mentioned in said complaint and writ of replevin in said defendant, and that he have possession thereof;" and it was held that the finding and judgment was conclusive between the parties to the suit on the bond as to the right of property, and precluded any proof of title thereto in a stranger in mitigation; but in *Stockwell v. Byrne*, 22 Ind. 6, it was held that, if the title was not tried in the replevin suit, title in a stranger may be shown to reduce the recovery to nominal damages.

<sup>1</sup> *Lee v. Hastings*, 13 Neb. 508.

<sup>2</sup> *Vinyard v. Barnes*, 124 Ill. 346; *Thomas v. Irwin*, 90 Ind. 557.

<sup>3</sup> *Lee v. Hastings*, 13 Neb. 508.

judgment.<sup>1</sup> They are not bound for any liability of their principal not involved in the replevin suit;<sup>2</sup> nor for the damages sustained by one who has been substituted as defendant in his stead.<sup>3</sup> If such suit is dismissed as to one of the defendants and proceeds to judgment against the other the sureties are released.<sup>4</sup>

In an action for the equitable reduction of damages on a replevin bond given by one partner who has taken from his copartner some of the firm property, the rule is full indemnity for the obligee, and the obligor must establish not merely the apparent interest of the other in the property replevied upon a numerical division of it among the members of the firm, but go further and show that as between the obligee and himself the former will have had more of the property and funds of the firm than himself if full damages are given, or that the obligee is indebted to the firm, and his equitable interest in the property does not equal the value of that replevied and not returned.<sup>5</sup>

[54] § 508. When plaintiff recovers as special owner. The cases in which a defendant in replevin will be limited to the value of his special interest are those in which the other party is the general owner or represents him, or has made [55] reparation to him.<sup>6</sup> In replevin brought by a mere stranger to the title, who never had possession until he obtained it by the writ, on a judgment for return, or in an action on his bond for breach of the condition to return the property, recovery may be had for its full value, although the party so recovering, as between him and the general owner, has but a possessory right.<sup>7</sup> Where a bond in accord-

<sup>1</sup> Sweeney v. Lomme, 22 Wall. 208.

<sup>2</sup> Lee v. Hastings, 13 Neb. 508.

<sup>3</sup> Vinton v. Mansfield, 48 Conn. 474.

But see Hanna v. International Petroleum Co., 23 Ohio St. 622, stated in note 1, next section.

<sup>4</sup> Tyler v. Davis, 63 Miss. 345.

<sup>5</sup> Clapham v. Crabtree, 72 Me. 473.

<sup>6</sup> Atkins v. Moore, 82 Ill. 240; Broadwell v. Paradice, 81 id. 474; Dilworth v. McKelvey, 30 Mo. 149; Rhoades v. Woods, 41 Barb. 471; Seaman v. Luce, 23 Barb. 240; Noble v.

Epperly, 6 Ind. 468; Fitzhugh v. Wiman, 9 N. Y. 559; Weaver v. Darby, 42 Barb. 441; Buck v. Remsen, 34 N. Y. 383.

<sup>7</sup> Russell v. Butterfield, 21 Wend. 30; First Nat. Bank v. Crowley, 24 Mich. 492; Woodman v. Nottingham, 49 N. H. 387; Littlefield v. Biddeford, 29 Me. 310; Fallon v. Manning, 35 Mo. 271; Frei v. Vogel, 40 Mo. 149; White v. Webb, 15 Conn. 303; Ingersoll v. Van Bokkelen, 7 Cow. 670; Green v. Clark, 12 N. Y. 343; Brizee

ance with the practice prescribed by statute is conditioned to return the property if adjudged, and to pay any judgment that the defendant may recover against the plaintiff in the replevin suit, it obviously extends and will be limited to such judgment as the statute then in force provides for. Then, [56] if the statute gives a defendant who recovers judgment by nonsuit or discontinuance an absolute right to a return, or in lieu thereof, at his election, a judgment for the value, in addition to damages for detention, the bond will cover any judgment recovered for the value, and especially if the statute provides that in a suit on the bond the amount for which judgment is recovered in replevin shall be the measure of damages, these cannot be reduced or increased by proof of any facts antecedent to the judgment.<sup>1</sup> But if, under the code practice, a judgment for return is rendered, and there is no adjudication of the value to be paid or collected in case delivery of the property cannot be had, the obligee is, nevertheless, entitled to recover the value on the undertaking or bond.<sup>2</sup>

v. Maybee, 21 Wend. 144; Kennedy v. Whitwell, 4 Pick. 466; Van Baalen v. Dean, 27 Mich. 104; Stanley v. Gaylord, 1 Cush. 536; Farnham v. Moor, 21 Me. 508; Mattoon v. Pearce, 12 Mass. 406; Flagg v. Tyler, 6 id. 33.

In *Hanna v. International Petroleum Co.*, 23 Ohio St. 622, it was held in replevin brought against a party having possession of the property as agent, that the principal might be substituted in his place without releasing the sureties in the replevin bond — that they stand bound for the indemnity of the new party equally as though he had been the original and only defendant — it is no prejudice to the plaintiff in the replevin suit. Compare *Walter v. Warfield*, 2 Gill, 216; *Vinton v. Mansfield*, 48 Conn. 474; *Tyler v. Davis*, 63 Miss. 345, stated in last section.

<sup>1</sup> *Williams v. Vail*, 9 Mich. 162.

<sup>2</sup> *Whitney v. Lehmer*, 26 Ind. 503. In this case *Frazer, J.*, said: "It is clearly not a void judgment; and

the question is, what are the liabilities of the obligors in the replevin bond, who undertook that the plaintiff in that suit would return the property if such a return should be adjudged, as it has been. Is the defendant in that suit precluded from recovering the actual damages which resulted to him merely because the jury in that case failed to find the value of the property? . . . In the absence of any direct authority, the case must find its solution in such general rules of the law as seem to be applicable to it. It will be noticed that the statute under examination contains no negative words, nor does it purport to prescribe a mode by which a remedy may be obtained upon the bond, or the tribunal where that remedy shall be sought. It does not even regulate the practice in a suit upon the bond; it is the practice in the replevin suit only which it prescribes. We have, then, a valid bond; its conditions broken;



The condition is absolute to return the property, if adjudged, [57] and damages may be assessed on it unless it is satisfied by performance of other conditions. Where, however, a judgment regulated by the code is rendered absolutely for the value and not as an alternative, if delivery of the property cannot be had the liability of the sureties for that judgment is not so clear.<sup>1</sup>

**§ 509. Bond by defendant to retain the property.** The defendant is permitted in many jurisdictions to prevent the delivery of replevied property to the plaintiff, by giving a bond substantially like that required of the latter, except the condition to prosecute the suit. The measure of damages, of

what is the measure of damages for breach of the condition to return the property? The answer furnished in all the cases ever decided, when no statute interfered, is the value of the property at least; this value to be shown as in ordinary cases involving an inquiry as to value. The case is not one where the statute creates a new right, giving a particular remedy therefor. In such a case the statutory remedy is the only one. But this is a right of action arising by the common law out of a breach of the contract; and if the statute gives a remedy without negative words, the common-law remedy still remains, and may be pursued at the plaintiff's option. An assessment of the value of the property in the replevin suit, and a judgment in the alternative for its return or its value, would, as evidence, undoubtedly have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever. But it does not follow that the absence of such assessment and judgment shall have the practical effect of a finding and judgment that the property was of no value, or that no other tribunal

shall examine the question. Common justice, as well as reason, would be shocked by the announcement of such a doctrine. The statute does not so declare, either in terms or by any implication which the recognized rules of construction will warrant. Grant that the plaintiffs had the right to have the verdict of the jury which tried the replevin suit upon the question of the value of the property. They should have asserted the right, and failing to do so then, when they should have acted, shall they do so now when it is impossible for their adversary to obtain that verdict? Nor can the surety . . . be deemed to be in any better position than his principals. His liability is co-extensive with theirs. Nothing has been done to work his discharge, if it be conceded that his principals are yet bound." *Yelton v. Slinkard*, 85 Ind. 190; *Sweeney v. Lomme*, 22 Wall. 208.

<sup>1</sup> *Gallarati v. Orser*, 27 N. Y. 324; *Ashley v. Peterson*, 25 Wis. 621; *Nickerson v. Chatterton*, 7 Cal. 568; *Clary v. Rolland*, 24 Cal. 147; *Mason v. Richards*, 12 Iowa, 74; *Lomme v. Sweeney*, 1 Mont. 584; *Sweeney v. Lomme*, 22 Wall. 208.

course, will be the same for breach of like conditions.<sup>1</sup> The costs of the action of replevin cannot be recovered on this bond;<sup>2</sup> nor the damages to the property while in the defendant's possession, if accepted by the officer on the writ of return, unless the bond is conditioned to pay any judgment recovered against the defendant, and a judgment is recovered for such damages.<sup>3</sup> If the defendant's undertaking admits that the plaintiff has taken the property described in his affidavit and requisition from his possession he cannot afterward deny that he had possession of such property or any part of it at the commencement of the action, or show that it was different or other property from that described.<sup>4</sup> The defendant cannot set up in defense of an action on his bond any issue which he could with reasonable diligence have set up or interposed in the replevin suit. It is a defense *pro tanto* if the property has been sold by a receiver and after the trial of such suit the plaintiff therein applied to the court for and received a portion of the proceeds of the sale, the remainder being held to abide the result of the action in which the receiver was appointed.<sup>5</sup>

## SECTION 6.

### ATTACHMENT AND FORTHCOMING BONDS.

§ 510. **Attachment bonds.** Attachment bonds and [58] undertakings are statutory obligations, differing somewhat in form in the several states, but not substantially in legal effect. They are generally conditioned that the obligors will pay all damages which the defendant in the suit may sustain by reason of the attachment, if the plaintiff shall fail to recover judgment, or because of the wrongful suing out of the writ. By "wrongful," as used in the statutes and in obligations made under them, is meant unjustly, injuriously, tortiously, in

<sup>1</sup> In *Tibbal v. Cahoon*, 10 Watts, 232, the plaintiff gave bond with surety to prosecute the suit to effect and without delay, and to return the property if adjudged; the defendant gave a counter bond, and retained the property. Afterwards, arbitration awarded no cause of action. It was held that the plaintiff's sureties were liable for costs in the replevin suit.

<sup>2</sup> *Lutes v. Alpaugh*, 23 N. J. L. 165.

<sup>3</sup> *Douglass v. Douglass*, 21 Wall. 98.

<sup>4</sup> *Martin v. Gilbert*, 119 N. Y. 298;

*Diossy v. Morgan*, 74 id. 11.

<sup>5</sup> *Boyd v. Huffaker*, 39 Kan. 525.

violation of right.<sup>1</sup> The condition of the bond is violated if the causes alleged for attachment do not exist, although the party suing it out may have believed in their existence;<sup>2</sup> but not if the alleged ground is true in fact, though the party who made the allegation had no knowledge of its truth.<sup>3</sup> The principal and his sureties are liable for the wrongful suing out of an attachment by an agent, though it was done without directions.<sup>4</sup> If an attachment is dissolved after notice and hearing because the allegations in the affidavit were false and the case is not one in which the writ might issue, this is conclusive in an action upon the bond that it was wrongfully obtained, the ruling not being reversed.<sup>5</sup> If a suit is abandoned under circumstances which show that it was not instituted in good faith, the plaintiff is liable. "Suitors who try experiments without hope of success must take the consequences. They cannot be considered in good faith."<sup>6</sup> If the issue in the attachment is disposed of without determining whether it was wrongfully obtained that question may be adjudicated in the suit on the bond.<sup>7</sup> A judgment in the original suit, fixing the damages, is not a condition precedent to an action against the sureties.<sup>8</sup> It is held in Kentucky that mere failure to succeed in the attachment suit will not forfeit the attachment bond, but it must be shown that it was wrongfully obtained; that is, without just cause; and in case of a nonsuit or an abandonment of the suit this would not necessarily appear.<sup>9</sup>

<sup>1</sup> *Raver v. Webster*, 3 Iowa, 502; *Smith v. Eakin*, 2 Sneed (Tenn.), 456, 462; *Carothers v. McIlhenny Co.*, 63 Texas, 138; *Woods v. Huffman*, 64 id. 98.

There must be a debt due or to become due, and the existence of one of the statutory grounds for suing out the writ. *McLane v. Tighe*, 89 Ala. 411; *Bliss v. Heasty*, 61 Ill. 338; *Steen v. Ross*, 22 Fla. 480

<sup>2</sup> *Pollock v. Gantt*, 69 Ala. 373; *City Nat. Bank v. Jeffries*, 73 id. 183; *Jackson v. Smith*, 75 id. 97; *Pettit v. Mercer*, 8 B. Mon. 51. But see *Mahnke v. Damon*, 3 Iowa, 107.

<sup>3</sup> *McCormick Harvesting M. Co. v.*

*Colliver*, 75 Iowa, 559; *Calhoun v. Hannan*, 87 Ala. 277.

<sup>4</sup> *Jackson v. Smith*, 75 Ala. 97.

<sup>5</sup> *Hoge v. Norton*, 22 Kan. 374; *Trentman v. Wiley*, 85 Ind. 33; *Sannes v. Ross*, 105 id. 558; *State v. McKeon*, 25 Mo. App. 667.

<sup>6</sup> *Littlejohn v. Wilcox*, 2 La. Ann. 620; *Blum v. Gaines*, 57 Texas, 135.

<sup>7</sup> *Renkert v. Elliott*, 11 Lea (Tenn.), 235.

<sup>8</sup> *Boatwright v. Stewart*, 37 Ark. 614.

<sup>9</sup> *Pettit v. Mercer*, 8 B. Mon. 51; *Cooper v. Hill's Adm'r*, 3 Bush, 219. See *Young v. Broadbent*, 23 Iowa, 539.

If plaintiff has a good cause of

§ 511. **Who may sue.** Under the federal statutes<sup>1</sup> the right of action in a bankrupt for the wrongful attachment of his chattels passes to his assignee so far as compensation is claimed for injuring, detaining or converting the property. The right to compensation for injury to the bankrupt's business, reputation and credit and to vindictive damages for maliciously suing out the attachment or abusively using the process remains in him. Hence separate actions may be maintained; the liability of the sureties being limited to the penalty of the bond.<sup>2</sup> A bond payable to a named defendant "*et al.*" inures to the benefit of each and all of several defendants. If one alone is aggrieved he may sue in his own name or in the names of all for his use. The obligors are liable to each defendant severally if each has a several interest, and the sureties for each of their principals severally as well as jointly.<sup>3</sup>

§ 512. **Damages recoverable.** In the absence of statutes authorizing the recovery of exemplary damages the obligor and his sureties are not liable for anything beyond such actual damages as are the direct result of the attachment. The question of malice is not an issue. If an attachment has been obtained without just cause, the terms of the bond secure to the defendant all costs and damages that he has sustained in consequence thereof. The condition is satisfied and its terms substantially complied with, by awarding him damages adequate to the injury to the property attached and the loss arising from the deprivation of its use, together with the [59] costs and actual expenses incurred. It is considered that the legislature did not intend to impose on the sureties in the bond a more extensive liability. The plaintiff is not bound to show malice, nor can the defendant rely for defense on probable cause.<sup>4</sup> The actual damages have generally been stated to be the injury to the plaintiff by being deprived of the use of his property, or its loss, destruction or deterioration, to-

action on which an attachment might issue, a dissolution of the attachment for some irregularity is not ground for recovering on the bond under a statute which imposes liability for "improperly" suing out the writ. *Steen v. Ross*, 22 Fla. 480.

<sup>1</sup> § 5046, R. S.

<sup>2</sup> *Doll v. Cooper*, 9 Lea (Tenn.), 576.

<sup>3</sup> *Renkert v. Elliott*, 11 Lea, 235. See *Watts v. Rice*, 75 Ala. 289, stated in § 513.

<sup>4</sup> *Goodbar v. Lindsley*, 51 Ark. 380; *Marqueze v. Sontheimer*, 59 Miss. 430; *McClendon v. Wells*, 20 S. C. 514; *Pettit v. Mercer*, 8 B. Mon. 51.



gether with the costs and expenses incurred by him in the defense of the suit.<sup>1</sup> If property has been taken the owner is entitled to its fair cash value at the time it was taken with interest at the statutory rate;<sup>2</sup> he is not bound by the price for which it was sold under an order of the court.<sup>3</sup> Interest is not recoverable upon such value or upon the expenses incurred in the suit until the property has been seized and liability for the expenses has attached.<sup>4</sup> If a fund deposited in bank is levied upon its owner is entitled to recover such sum as represents the excess of interest which he could have obtained for it over the amount allowed by the bank holding the fund.<sup>5</sup> If shares of stock are attached interest is recoverable on them, and also on dividends thereon subsequently declared, these being bound by the attachment.<sup>6</sup> The expense which the owner of horses incurs by hiring others to do the work of those taken from him in order that he may perform a contract previously entered into may be recovered; and the recovery may be for such sum as the use of the property was worth to him though that is in excess of the market value.<sup>7</sup> If by reason of the attachment the owner of property is unable to dispose of it, a depreciation of its value by reason of a change in the market is as much a ground of damage as though it resulted from any other cause.<sup>8</sup> But it has been ruled in New York on an appeal from an order denying defendant's application for an increase in the amount of the undertaking, that where an attachment has been made upon stocks the fact that

<sup>1</sup> Reidhar v. Berger, 8 B. Mon. 160; Pettit v. Mercer, id. 51; Campbell v. Chamberlain, 10 Iowa, 337; Frankel v. Stern, 44 Cal. 168; Bruce v. Coleman, 1 Handy (Ohio), 515; Alexander v. Jacoby, 23 Ohio St. 358; Boatwright v. Stewart, 37 Ark. 614; Lowenstein v. Monroe, 55 Iowa, 82; Sanford v. Willetts, 29 Kan. 647; Marqueze v. Sontheimer, 59 Miss. 430; Porter v. Knight, 63 Iowa, 365.

<sup>2</sup> Porter v. Knight, 63 Iowa, 365.

The damages for wrongfully sequestering a homestead are not confined to the value of the rent during the time its owner was unable to oc-

cupy it; his removal to another home and the inconvenience resulting are the natural and proximate results of its seizure and elements of actual damage. Blum v. Gaines, 57 Texas. 135.

<sup>3</sup> Trentman v. Wiley, 85 Ind. 33.

<sup>4</sup> Id.

<sup>5</sup> Northampton Nat. Bank v. Wylie, 52 Hun, 146.

<sup>6</sup> Jacobus v. Monongahela Nat. Bank, 35 Fed. Rep. 395.

<sup>7</sup> State v. McKeon, 25 Mo. App. 667.

<sup>8</sup> Fleming v. Bailey, 44 Miss. 132; Horn v. Bayard, 11 Rob. (La.) 259.

during the continuance of the suit the shares have depreciated in price does not render the sureties upon the undertaking liable for the loss.<sup>1</sup> Where a stock of goods is attached damages for interruption of the owner's business may be recovered, as well as reasonable costs and expenses incurred in procuring the discharge of the attachment and restoration of the property; but injury to the reputation of goods, caused by the levy of an attachment thereon, are too vague and uncertain to be capable of legitimate proof.<sup>2</sup> But the Mississippi court has no doubt that it is proper to allow the damages proved to have arisen from a loss of business with respect to the goods seized, in so far as their seizure suspended business and caused a loss as to those goods.<sup>3</sup> Injury to the credit and reputation of [60] the party proceeded against by attachment has generally been held too remote and speculative;<sup>4</sup> though it is otherwise in Nebraska and in Alabama, if the writ is sued out on allegations of fraud.<sup>5</sup> Where malice is properly charged, however, such damages have been allowed.<sup>6</sup> To enhance the damages it is

<sup>1</sup> *Miller v. Ferry*, 50 Hun, 256. This case is based upon *McBride v. Farmers' Branch Bank*, 7 Abb. Pr. 347, in which an attachment was levied on money on deposit. The defendant made an unsuccessful defense, but did not procure a dissolution of the attachment by giving security, neither did he apply for an order directing the sheriff to collect the money. While the litigation was pending the holder of the fund failed. The attachment plaintiff was not liable for the loss.

<sup>2</sup> *Oberne v. Gaylord*, 13 Ill. App. 30, approving the text; *Alexander v. Jacoby*, 23 Ohio St. 358; *Moore v. Schultz*, 31 Md. 418.

<sup>3</sup> *Marqueze v. Sontheimer*, 59 Miss. 430, 442.

<sup>4</sup> *Campbell v. Chamberlain*, 10 Iowa, 337; *Pettit v. Mercer*, 8 B. Mon. 51; *Heath v. Lent*, 1 Cal. 410; *Lowenstein v. Monroe*, 55 Iowa, 82; *Oberne v. Gaylord*, 13 Ill. App. 30; *State v. Thomas*, 19 Mo. 613; *Holliday v. Cohen*, 34 Ark. 707.

In case of the stoppage of business the damages must be limited to the probable profits during the time it is suspended. Injury to credit and loss of prospective profits is too remote and speculative. *Holliday v. Cohen*, *supra*. See *Lawrence v. Hagerman*, 56 Ill. 68.

<sup>5</sup> *Marx v. Leinkauff*, 93 Ala. 453, 460; *Meyer v. Fagan* (Neb.), 51 N. W. Rep. 753.

<sup>6</sup> *Mayer v. Duke*, 72 Texas, 445; *Goldsmith v. Picard*, 27 Ala. 142; *Flournoy v. Lyon*, 70 id. 308 (although there was no levy); *Donnell v. Jones*, 11 id. 689.

In Tennessee the recovery is to be had on the same principles as in the common-law action for malicious suits, modified by the nature of the case. The modification would be, in the case of a merchant, injury to his reputation and credit as a business man, and the wrong done by the wreck of his business caused by his being thrown into bankruptcy on a false

admissible to show that the property attached was designed for a special use which, being thwarted by the attachment, has been materially lessened in value.<sup>1</sup> Depreciation of the attached property while in the officer's hands is a legitimate subject of inquiry with a view to damages therefor;<sup>2</sup> but only where it is personal. There can be no recovery for a depreciation of real estate while subject to the attachment.<sup>3</sup> This proposition is based upon the ground of remoteness of damage. It is very doubtful if it rests upon a tenable basis.

§ 513. **Same subject.** As we have seen, there are cases which deny the right to recover damages on account of the loss of profits because they are too remote. On this theory it has been held that a plaintiff in a suit on the bond cannot prove that by reason of the attachment and the interruption of his business he lost advances which he had made and the opportunity to dispose of property which came to him as the result of the advances made to others.<sup>4</sup> In a Kansas case<sup>5</sup> a herd of cattle was attached and taken from the range where they had been kept and placed on another range. The jury found that by reason of the inferiority of the latter the cattle did not increase in weight as they should have done; that they did not depreciate in value, but that they did not grow as they would if they had not been removed. Brewer, J., said: "It is a case of gain prevented rather than of loss sustained, and the questions are whether such gain prevented is proximate and certain — directly the result of the removal and inferior care — and the amount thereof susceptible of reasonably certain measurement. Both these questions the jury, by their verdict, answered in the affirmative, and we cannot say that the testimony did not fully warrant the answers. Of course, absolute certainty is not attainable, as in casting up the figures of an account; but nevertheless there are certain laws of feeding and growth, well understood among cattle men, and whose results work out with sufficient certainty for

and unfounded claim, with perhaps other elements, such as the costs of the wrongful suits. *Doll v. Cooper*, 9 Lea, 576, 586.

<sup>1</sup> *Knapp v. Barnard*, 78 Iowa, 347; *Carpenter v. Stevenson*, 6 Bush, 259.

<sup>2</sup> *Frankel v. Stern*, 44 Cal. 168; *Meshke v. Van Doren*, 16 Wis. 319; *Fleming v. Bailey*, 44 Miss. 132.

<sup>3</sup> *Heath v. Lent*, 1 Cal. 410.

<sup>4</sup> *Pollock v. Gantt*, 69 Ala. 373.

<sup>5</sup> *Hoge v. Norton*, 22 Kan. 374.

business calculations and judicial investigations. The raising of cattle for market has been an extensive and oftentimes profitable business in this state, and it would be strange if one could wrongfully take from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food, and so treat them that during the growing season they do not grow at all, and then at its end return them, saying, as did the unfaithful servant in the parable who returned the single talent without increase, 'Lo! there thou hast that is thine,' and still be under no liability to respond in damages to such owner. We do not think the law is so deficient. It seems clear that the owner is damaged, that the damage may be determined to a reasonable certainty, and that the wrong-doer is bound to make good the damages."

The rule that consecutive wrongs done independently by different persons cannot be joined to increase the responsibility of one wrong-doer applies to an action on an attachment bond. Hence the defendant is not liable for injury resulting from the sale of the attachment defendant's property under executions levied by his creditors simultaneously with the former's attachment, although they were issued sooner than they would have been if the attachment had not been levied.<sup>1</sup> The attachment defendant cannot recover damages which would not have been sustained but for his own voluntary act.<sup>2</sup> Sureties are not bound beyond the letter of their contract; hence if a bond is payable to a partnership in the firm name and conditioned to pay all such damages as they may sustain, there is no liability to one of the members of the firm for damages resulting to him by reason of the wrongful levy of the attachment on his individual property.<sup>3</sup> The usual bond does not hold the sureties responsible for the act of their principal in intervening after the levy and inducing the officer to sell the goods in unreasonably large quantities, thereby diminishing the sum realized.<sup>4</sup>

§ 514. **Exemplary damages.** The code of Alabama permits the recovery of vindictive damages on attachment bonds

<sup>1</sup> Goodbar v. Lindsley, 51 Ark. 380;

<sup>3</sup> Watts v. Rice, 75 Ala. 289.

Marqueze v. Sontheimer, 59 Miss.

<sup>4</sup> Jefferson Co. Bank v. Eborn, 84 Ala. 529.

<sup>2</sup> Charles City P. & M. Co. v. Jones,

71 Iowa, 234.



where the attachments have been maliciously and wrongfully sued out. A case is within the statute if there is no reasonable foundation for believing that a statutory ground for the attachment exists, or if the process be sued out wantonly or recklessly without probable cause; or if it be resorted to in a mere race of diligence to obtain a first lien when no ground exists in fact, or is reasonably believed to exist.<sup>1</sup> But if one of the grounds for issuing an attachment exists exemplary damages cannot be recovered on account of the motive which prompted the plaintiff to issue it.<sup>2</sup> If the elements of wrong and malice exist the attachment defendant may recover for injury to his feelings.<sup>3</sup> Corporations are liable for the acts of their agents in maliciously obtaining attachments.<sup>4</sup>

In Iowa<sup>5</sup> exemplary damages are recoverable if the attachment was sued out maliciously. To bring a case within this provision it must be shown that the writ was procured without reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design or set purpose of injuring the defendant.<sup>6</sup> Such damages are awarded in Tennessee. It is settled there "that all such damages as might be recovered in an action on the case at common law, as well as vindictive damages, in case the wrongful suing out the attachment was also malicious, are recoverable in the action on the bond."<sup>7</sup> Texas is, apparently, an exception to the rule that vindictive damages are not recoverable unless authorized by statute. There, such damages are allowed to the extent of attorneys' fees and injury to credit.<sup>8</sup>

A principal is not responsible for the malice of his agent in suing out an attachment unless he was the cause of or participated in it,<sup>9</sup> or ratified his act with knowledge of facts showing the agent's state of mind.<sup>10</sup> This question is discussed

<sup>1</sup> *City Nat. Bank v. Jeffries*, 73 Ala. 183.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Jefferson Co. Bank v. Eborn*, 84 Ala. 529.

<sup>5</sup> 2 McClain's Ann. Code, § 2961.

<sup>6</sup> *Nordhaus v. Peterson*, 54 Iowa, 68.

<sup>7</sup> *Smith v. Story*, 4 Humph. 172; *Smith v. Eakin*, 2 Sneed, 461; *Doll v. Cooper*, 9 Lea, 576, 585.

<sup>8</sup> *Hughes v. Brooks*, 36 Texas, 379.

*Wallace v. Finberg*, 46 id. 47;

*Landes v. Eichelberger*, 2 Tex. Civ. Cas. 127; *Schwartz v. Burton*, 1 id. 698;

*Tynburg v. Cohen*, 67 Texas, 220.

<sup>9</sup> *Pollock v. Gantt*, 69 Ala. 373; *City*

*Nat. Bank v. Jeffries*, 73 id. 183;

*Jackson v. Smith*, 75 id. 97.

<sup>10</sup> *Tynburg v. Cohen*, 67 Texas, 220.

in the chapter on exemplary damages, as is also the advice of counsel as evidence to rebut the charge of malice.<sup>1</sup> It is sufficient to add here that such advice must be given after a full and fair statement of the facts.<sup>2</sup> It is held in Iowa that the advice of an attorney not in actual practice, although he was a stockholder in the corporation which was plaintiff in the attachment proceedings, may be proven for what it is worth.<sup>3</sup>

§ 515. **What may be shown in defense.** If the attachment defendant has recovered against the plaintiff the general damages arising from loss of credit, impaired reputation and injured feelings, he cannot subsequently sue on the bond to recover for the expense and loss of time in defending the attachment and the loss of or injury to the attached property.<sup>4</sup> If the latter is taken out of the hands of the attachment defendant, and an action on the bond accrues, the obligors are *prima facie* liable for its value.<sup>5</sup> The return of it, however, or its subsequent lawful seizure by the same officer on execution or other authority against the owner, and its appropriation to pay his debt for which the officer was empowered to make seizure, will go in mitigation.<sup>6</sup> Where the possession of the attachment defendant has not been disturbed, he is still entitled to recover on the bond for any intermeddling with it.<sup>7</sup> Damages for being deprived of the use of property do not embrace consequential and secondary losses. Thus, where a lot of merchandise was levied on, but, on the failure of the case, restored, it was held in an action on the bond that a loss to the plaintiff resulting from the attachment on his license to vend goods, and the services of himself and wife during the pendency of the suit, should have been excluded from the consideration of the jury; that the inquiry in regard to the injury which the party sustained by being deprived of the [61]

<sup>1</sup> Vol. 1, ch. 9.

<sup>2</sup> Porter v. Knight, 63 Iowa, 365.

<sup>3</sup> Charles City P. & M. Co. v. Jones, 71 Iowa, 234.

<sup>4</sup> Hall v. Forman, 82 Ky. 505.

<sup>5</sup> Dunning v. Humphrey, 24 Wend. 31.

<sup>6</sup> Earle v. Spooner, 3 Denio, 246; Bennett v. Brown, 31 Barb. 158; S. C., 20 N. Y. 99; City Nat. Bank v.

Jeffries, 73 Ala. 183; Boatwright v. Stewart, 37 Ark. 614; Trentman v. Wiley, 85 Ind. 33; Empire Mill Co. v. Lovell, 77 Iowa, 100; Mayer v. Duke, 72 Texas, 445. See Wanamaker v. Bowers, 36 Md. 42.

<sup>7</sup> Dunning v. Humphrey, 24 Wend. 31. Compare Groat v. Gillespie, 25 Wend. 383.

use of his property should be limited to the actual value of the use; as, for example, the rent of the real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. If not of that character, the injury from being deprived of the use should be restricted to interest upon the value.<sup>1</sup> And where an attachment was levied upon a house which was being taken to pieces for removal to and erection upon other premises, damages were not permitted to be recovered on the bond for injury to furniture by exposure in consequence of the plaintiff being prevented or delayed from rebuilding the house; nor for the additional expense of reconstructing it. The value of the use, it was said, must be predicated upon the condition of the property when it was attached, and not upon what its condition was before or what it was intended to be in the future.<sup>2</sup> A very restricted rule of liability was here announced and applied; and it is certain that unless considerably expanded it would often prevent the recovery of reasonable and fair compensation. Suppose an important part of a mill to be detached for some temporary purpose, necessitating its stoppage and the work of all the laborers and all the other dependencies; and when it is about to be put in place again it is taken under an attachment; is the value of its use to be estimated according to its condition when attached, without regard to what it had been, or what it was intended to be in the future?

§ 516. **Costs and expenses; attorneys' fees.** The costs and expenses of defending against the attachment, procuring its discharge, and the restoration of the property, may be recovered as part of the damages on such a bond.<sup>3</sup> Such dam-

<sup>1</sup> Reidhar v. Berger, 8 B. Mon. 160. See Alexander v. Jacoby, 23 Ohio St. 358.

<sup>2</sup> Plumb v. Woodmansee, 34 Iowa, 116.

<sup>3</sup> Dunning v. Humphrey, 24 Wend. 31; Groat v. Gillespie, 25 id. 383; Pettit v. Mercer, 8 B. Mon. 51; Burton v. Smith, 49 Ala. 293; Alexander v. Jacoby, 23 Ohio St. 358; Schuyler v. Sylvester, 28 N. J. L. 487; Bruce v. Coleman, 1 Handy (Ohio), 515;

Northrup v. Garrett, 17 Hun, 497; Raymond v. Green, 12 Neb. 215; State v. Shobe, 23 Mo. App. 474 (plaintiff's traveling expenses in attending the attachment suit were allowed); State v. McHale, 16 id. 478 (cash paid for the examination of defendant's books and for a transcript of the record was allowed for; compensation for a stenographer's services was refused); Damron v. Sweetzer, 16 Ill. App. 339; Flournoy

ages also include costs upon a *certiorari* on which a judgment for the plaintiff in the attachment was reversed.<sup>1</sup> The [62] right to recover for reasonable attorney fees paid or incurred in obtaining a discharge of the attachment rests upon the same principle as the other costs and expenses incurred for the same purpose.<sup>2</sup> In some jurisdictions, however, they are denied.<sup>3</sup> As a rule the fees and other expenses incident to the defense of the principal suit on the merits are not recoverable.<sup>4</sup> In Indiana if the action and the attachment have both

v. Lyon, 70 Ala. 308 (if there was an actual levy); Dothard v. Sheid, 69 id. 135 (while such damages are the proximate, they are not the necessary, result of suing out the attachment, and therefore must be specially claimed).

<sup>1</sup> Bennett v. Brown, 20 N. Y. 99; S. C., 31 Barb. 158.

<sup>2</sup> Barton v. Smith, 49 Ala. 293; Northrup v. Garrett, 17 Hun, 497; Seay v. Greenwood, 21 Ala. 491; Swift v. Plessner, 39 Mich. 178; Ah Thaie v. Quan Wan, 3 Cal. 216; Prader v. Grim, 13 Cal. 585; Tyler v. Safford, 31 Kan. 608; Higgins v. Mansfield, 62 Ala. 267. In this case it was held the reasonable amount paid or promised to be paid to attorneys for defending the attachment suit, and the value of time lost, and expenses incurred in attending court for the trial, may be recovered in an action on the bond for the wrongful and vexatious suing out of the attachment. And also that damage resulting from the demoralization of the plaintiff's workmen while he was absent from his farm and procuring attorneys to defend the suit; or from his being compelled to stop a double plow while he was absent, are too remote, and should not be estimated in fixing the value of the plaintiff's services. Morris v. Price, 2 Blackf. 457; Plumb v. Woodmansee, 34 Iowa, 116. In Iowa attorneys' fees are expressly

allowed by statute, where there was no reasonable cause to believe the ground upon which the writ was issued to be true. Behrens v. McKenzie, 23 Iowa, 333. They are limited, however, to the services rendered in the auxiliary proceeding. Porter v. Knight, 63 id. 365.

<sup>3</sup> Goodbar v. Lindsley, 51 Ark. 380; Littleton v. Frank, 2 Lea (Tenn.), 300.

The federal courts usually deny such fees unless the law is settled otherwise by statute or the appellate court of the state in which they are held. Jacobus v. Monongahela Nat. Bank, 35 Fed. Rep. 395; Insurance Co. v. Conard, Baldwin, 138.

In Pennsylvania the policy concerning such fees in other actions is so firmly established that it is reasonably certain they cannot be recovered. Good v. Mylin, 8 Pa. St. 51; Haverstick v. Gas Co., 29 id. 254; Stopp v. Smith, 71 id. 285.

In Texas they are not recoverable when compensatory damages only are claimed; they are allowed when exemplary damages are recovered, and are regarded as an element thereof. See cases cited in note 8, § 514.

<sup>4</sup> Adam v. Gomila, 37 La. Ann. 479; Damron v. Sweetzer, 16 Ill. App. 339; Northampton Nat. Bank v. Wylie, 52 Hun, 146; Flournoy v. Lyon, 70 Ala. 308; Frost v. Jordan,



been defeated the reasonable attorneys' fees of the defendant in both may be recovered.<sup>1</sup> And in Missouri if the attachment is not dissolved until final judgment upon the merits, and a contest upon them was necessary to procure its dissolution, there may be a recovery of the whole costs and expenses.<sup>2</sup> Under a bond conditioned as the statute requires "to pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment," the sureties are liable for all costs awarded to the defendant in the action, and not merely such as resulted from the attachment.<sup>3</sup>

§ 517. **Forthcoming bonds.** These are usually conditioned for the delivery of the property to the officer to satisfy the judgment or execution which the plaintiff in an attachment may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced of the delivery of the property or the satisfaction of the judgment recovered.<sup>4</sup> The right of action is complete on the failure to deliver at the stipulated time,<sup>5</sup> unless the property attached is in the hands of a third person and the bond is conditioned for its delivery "when and where the court shall direct;" in which case an action cannot be begun until an order is made for its delivery.<sup>6</sup> If the condition to return is unqualified the bond is not satisfied by a tender of other property of the same kind and value, though that attached was perishable in its nature.<sup>7</sup> The whole property released must be returned.<sup>8</sup> If the condition is to deliver or pay the appraised value performance is not excused by the accidental destruction of the property by fire originating through human agency, without the obligor's fault;<sup>9</sup> but it is otherwise if delivery is prevented by an act of God.<sup>10</sup>

37 Minn. 544 (although jurisdiction was obtained by attaching the property).

<sup>1</sup> Wilson v. Root, 43 Ind. 486.

<sup>2</sup> State v. McHale, 16 Mo. App. 478; State v. Thomas, 19 Mo. 613; State v. Beldsmeier, 56 id. 226; State v. Stark, 75 id. 566.

<sup>3</sup> Greaves v. Newport, 41 Minn. 240; Lee v. Homer, 37 Hun, 634; Bing Gee v. Ah Jim, 7 Fed. Rep. 811; S. C., 7 Sawyer, 117; Stauffer v. Gar-

rison, 61 Miss. 67 (including attorneys' fees).

<sup>4</sup> Drake on Attach., § 327.

<sup>5</sup> Naynant v. Dodson, 12 Iowa, 22.

<sup>6</sup> Brotherton v. Thomson, 11 Mo. 94.

<sup>7</sup> Pearce v. Maguire, 20 Atl. Rep. 98 (R. I.).

<sup>8</sup> Metrovich v. Jovovich, 58 Cal. 341.

<sup>9</sup> Doggett v. Black, 40 Fed. Rep. 439.

<sup>10</sup> Phillipi v. Capell, 38 Ala. 575; Haralson v. Walker, 23 Ark. 415.

A surety may exonerate himself by delivering the property to the officer at any time before judgment is rendered against him on the bond.<sup>1</sup>

§ 518. **Measure of damages.** The measure of damages is the value of the property stipulated to be forthcoming, with interest from the time delivery became due, not exceeding the amount of the judgment in the attachment suit.<sup>2</sup> But this value should be computed subject to any paramount lien.<sup>3</sup> [63] Where a seizure was made under an attachment of property upon which the party having it in possession had a lien, and he procured a release of it by giving a forthcoming bond, it was held his lien was not thereby divested, and he was responsible on the bond only for the balance that remained in his hands after paying himself.<sup>4</sup> If the value be stated in the bond it will be conclusive on the obligors; otherwise it must be proved.<sup>5</sup> It is no defense that the property was not the defendant's.<sup>6</sup> The condition of the bond requires the property to be returned in such a state that it may be taken and disposed of in satisfaction of the judgment. A mere physical return of it is not sufficient if it be incumbered after the execution of the bond.<sup>7</sup>

§ 519. **Conditions to pay the judgment.** A bond to satisfy the judgment is not discharged by a surrender of the property attached;<sup>8</sup> nor by pointing out property of the judgment debtor from which the judgment could be collected, even though money to pay the expenses and charges of the proceedings is tendered.<sup>9</sup> It is no defense to show that the property attached did not then belong to the defendant;<sup>10</sup> or that it

<sup>1</sup> Reagan v. Kitchen, 3 Martin, 418; Hansford v. Perrin, 6 B. Mon. 595. See Payne v. Joyner, 7 Ark. 462.

<sup>2</sup> Hammond v. Starr, 79 Cal. 556; Collins v. Mitchell, 3 Fla. 4; Moon v. Story, 2 B. Mon. 354; Weed v. Dills, 34 Mo. 483; Jones v. Hays, 27 Tex. 1; Marshall v. Bailey, 27 Tex. 686; Pearce v. Maguire, 20 Atl. Rep. 98 (R. I.). See Anthony v. Comstock, 1 R. I. 454.

<sup>3</sup> Hayman v. Hallam, 79 Ky. 389; Canfield v. McLaughlin, 10 Martin, 48; Metrovich v. Jovovich, 58 Cal. 341.

<sup>4</sup> Canfield v. McLaughlin, *supra*.

<sup>5</sup> Moon v. Story, 2 B. Mon. 354; Weed v. Dills, 34 Mo. 483.

<sup>6</sup> Sartin v. Weir, 3 Stew. & P. 421; Waterman v. Frank, 21 Mo. 108; Gray v. McLeal, 17 Ill. 404; Dorr v. Clark, 7 Mich. 310.

<sup>7</sup> Schuyler v. Sylvester, 28 N. J. L. 487.

<sup>8</sup> Dorr v. Kershaw, 18 La. 57.

<sup>9</sup> Hill v. Merl, 10 La. 108.

<sup>10</sup> Dorr v. Clark, 7 Mich. 310; Beal v. Alexander, 1 Rob. (La.) 277; Hazelrigg v. Donaldson, 2 Met. (Ky.) 445.

was not subject to attachment;<sup>1</sup> or was worth less than the judgment.<sup>2</sup> The judgment is the measure of damages irrespective of the value or the ownership of the property.<sup>3</sup>

## SECTION 7.

### INJUNCTION BONDS.

[64] § 520. **Scope of obligation.** These are statutory obligations, and though various in their phraseology have a general similarity of purpose and effect, binding the obligors to pay all such damages, or costs and damages, as the party enjoined shall sustain in consequence of the injunction if it shall be dissolved, or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues there is a right to damages, first, for costs and expenses incurred in defending against the writ and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers. Subject to an exception presently to be noticed, the defendant's only remedy for damages resulting from the wrongful suing out of an injunction, unless the plaintiff obtained the writ maliciously or without probable cause, is an action upon the bond.<sup>4</sup>

§ 521. **Power of a court of equity.** After an injunction has been granted without requiring a bond or other undertaking, a court of equity has no power to award damages to the party injured thereby, except so far as it may do so by a decree awarding costs. Before the writ is granted a federal circuit court, in the absence of any statutory or other authority except such as is inherent in a court of equity, may impose terms, and may relieve therefrom as the equities make it proper to do so. Whenever the question of the right to damages arises under the order of the court, its action in passing upon it approaches so nearly to the exercise of discretion that it will not be reversed unless a clear showing is made.<sup>5</sup> The

<sup>1</sup> *McMillan v. Dana*, 18 Cal. 339.

<sup>2</sup> *Phanstieshl v. Vanderhoof*, 22 Mich. 293.

<sup>3</sup> *Id.*; *Morange v. Edwards*, 1 E. D. Smith, 414.

<sup>4</sup> *Lawton v. Green*, 64 N. Y. 326;

*Hayden v. Keith*, 32 Minn. 277; *St.*

*Louis v. St. Louis Gas Light Co.*, 82 Mo. 349; *Sturgis v. Knapp*, 33 Vt.

486; *Russell v. Farley*, 105 U. S. 433;

*Palmer v. Foley*, 71 N. Y. 106.

<sup>5</sup> *Russell v. Farley*, 105 U. S. 433.

obligation entered into under such an order is not in the nature of a contract with the opposite party, but between the obligor and the court.<sup>1</sup> The right to damages does not depend at all upon the motive, suppression or default of the plaintiff, but solely on the fact that he was not entitled to the injunction.<sup>2</sup>

§ 522. **Right of action, when it arises.** If the bond is conditioned to pay damages if it shall finally be decided that the injunction ought not to have been granted, an action on it is prematurely brought if there has not been a final determination of the suit in which the injunction was obtained.<sup>3</sup> A dismissal of the petition for want of prosecution is a determination to that effect.<sup>4</sup> If the injunction is dissolved after a hearing upon the pleadings and upon affidavits, and the action is subsequently dismissed for want of prosecution, the right to damages is perfected.<sup>5</sup> And so where the dismissal is made at plaintiff's request, although without prejudice to a future action;<sup>6</sup> and where the injunction has been dissolved and a demurrer to the complaint sustained on the ground that the latter did not state facts sufficient to constitute a cause of action;<sup>7</sup> and where an order is entered, by plaintiff's consent, vacating the injunction, and subsequently another order, pursuant to his *ex parte* motion, is made discontinuing the action.<sup>8</sup> But it is otherwise where the discontinuance of the suit is by agreement.<sup>9</sup> The dissolution of the writ is *prima facie* evidence that the defendant has sustained damages, and is *res judicata* as to the issues raised.<sup>10</sup> If it is wrongfully issued as to any part of the plaintiff's demand, and is partially dissolved, to that extent the party enjoined will be entitled to

<sup>1</sup>Smith v. Day, 21 Ch. Div. 421.

<sup>6</sup>Mitchell v. Sullivan, 30 Kan. 231.

<sup>2</sup>Griffith v. Blake, 27 Ch. Div. 474.

<sup>7</sup>Bennett v. Pardini, 63 Cal. 154;

Jessel, M. R., expressed a contrary opinion in Smith v. Day, 21 id. 421; Cotton, L. J., differed with him.

Fowler v. Frisbie, 37 id. 34.

<sup>3</sup>Dougherty v. Dore, 63 Cal. 170; Gray v. Veirs, 33 Md. 159; Penny v. Holberg, 53 Miss. 567; Bemis v. Gannett, 8 Neb. 236.

<sup>8</sup>Pacific Mail Steamship Co. v. Toel, 9 Daly, 301; S. C., 85 N. Y. 646.

<sup>9</sup>Large v. Steer, 121 Pa. St. 30; Palmer v. Foley, 71 N. Y. 106.

<sup>4</sup>Pugh's Adm'r v. White, 78 Ky. 210.

<sup>10</sup>Lemeunier v. McClearley, 41 La. Ann. 411; Schuyler Co. v. Donaldson, 9 Mo. App. 385; Rice v. Cook, 92 Cal. 144; Fowler v. Frisbie, 37 id. 34.

<sup>5</sup>Kane v. Casgrain, 69 Wis. 430.



such damages, within the limit of the penalty of the bond, as he has sustained.<sup>1</sup>

§ 523. **Mode of assessing damages.** In so far as the mode of assessing damages upon injunction bonds is regulated by statutes or by local rules of practice, the subject cannot be considered here. Mr. High gives a summary of the cases in several states in the last edition of his standard treatise on injunctions.<sup>2</sup> That author says there has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference or otherwise the amount of damages sustained by the injunction, and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond,<sup>3</sup> the undoubted weight of authority and principle is against the exercise of such a jurisdiction.<sup>4</sup>

§ 524. **Costs and expenses; attorneys' fees.** In cases where the bond or undertaking embraces the payment of "costs," if the injunction be not sustained, taxable costs are meant, and they are necessarily a part of the damages by the very terms of the contract.<sup>5</sup> They are also a part thereof when costs *eo nomine* are not provided for.<sup>6</sup> And when the stipula-

<sup>1</sup> Rice v. Cook, 92 Cal. 144; White v. Clay's Ex'rs, 7 Leigh, 68; Walker v. Pritchard, 135 Ill. 103. Compare Russell v. Farley, 195 U. S. 103.

<sup>2</sup> Vol. 2 (3d ed.), § 1657.

<sup>3</sup> Sturgis v. Knapp, 33 Vt. 486; Edwards v. Pope, 4 Ill. 465. See Roberts v. Durst, 4 Ohio St. 502.

<sup>4</sup> Phelps v. Foster, 18 Ill. 309; Merryfield v. Jones, 2 Curt. C. C. 306; Garcie v. Sheldon, 3 Barb. 232; Lawton v. Green, 64 N. Y. 326; Bain v. Heath, 12 How. 168; Easton v. New York, etc. R. Co., 26 N. J. Eq. 359; Taylor v. Brownfield, 41 Iowa, 264; Sartor v. Strassheim, 8 Colo. 185; Greer v. Stewart, 48 Ark. 21. See *dictum* to the contrary in Russell v.

Farley, 105 U. S. 433. And see, to the same effect, Lea v. Deakin, 11 Biss. 40.

<sup>5</sup> Corcoran v. Judson, 24 N. Y. 106; Derry Bank v. Heath, 45 N. H. 524; Troxell v. Haynes, 49 How. Pr. 517; S. C., 16 Abb. Pr. (N. S.) 1; Moore v. Harton, 1 Port. 15.

<sup>6</sup> *Id.*; Edwards v. Bodine, 11 Paige, 223; Coates v. Coates, 1 Duer, 664; Aldrich v. Reynolds, 1 Barb. Ch. 613; Andrews v. Glenville Woolen Co., 50 N. Y. 282; Hovey v. Rubber Tip Co., 50 N. Y. 335; S. C., 12 Abb. (N. S.) 360; Disbrow v. Garcia, 52 N. Y. 654; Rose v. Post, 56 N. Y. 603; S. C., 49 How. Pr. 517; Noble v. Arnold, 23 Ohio St. 264; Strong v. Deforest, 15

tion is to pay the damages which may result if the injunction is dissolved, attorneys' fees paid for obtaining a dissolution of it are recoverable in many states.<sup>1</sup> Costs paid as a condition for a continuance cannot be recovered as part of the damages.<sup>2</sup> Where an injunction has been improvidently granted, or [65] obtained without good cause, the defendant should take reasonable steps, probably, to relieve himself from its operation, and thus prevent damages.<sup>3</sup> A party who slept upon his rights and neglected this duty, so that the demand enjoined became barred by the statute of limitations before he finally made a successful motion to dissolve the injunction, was not permitted to recover on the bond for that loss.<sup>4</sup> It is therefore one of the direct effects of a groundless injunction to necessitate exertion and costs to get rid of it. Accordingly, costs and expenses, reasonable in amount, incurred for the single object of obtaining a discharge of the injunction, are generally allowed as a part of the damages on such obligations.<sup>5</sup> The law sanctions a resort to appropriate means, and

Abb. 427; Taacks v. Schmidt, 18 Abb. 307; Wilde v. Joel, 15 How. Pr. 320; S. C., 6 Duer, 671; Behrens v. McKenzie, 23 Iowa, 333; Langworthy v. McKelvey, 25 Iowa, 48; Riddle v. Cheandle, 25 Ohio St. 278; School Directors v. Trustees, 66 Ill. 247; Elder v. Sabin, 66 Ill. 126; Misner v. Bullard, 43 Ill. 470; Ryan v. Anderson, 24 Ill. 652; McRae v. Brown, 12 La. Ann. 181; Ah Thaie v. Quan Wan, 3 Cal. 216; Wilson v. McEvoy, 25 Cal. 169; Prader v. Grimm, 28 Cal. 11; S. C., 13 Cal. 585; Gear v. Shaw, 1 Pin. (Wis.) 698.

<sup>1</sup> Id.; Wittich v. O'Neal, 22 Fla. 592; Richardson v. Allen, 74 Ga. 719; Swan v. Timmons, 81 Ind. 243; Ford v. Loomis, 62 Iowa, 586; Aiken v. Leathers, 40 La. Ann. 23; Hammerslough v. Kansas City B. L. & S. Ass'n, 79 Mo. 80; Miles v. Edwards, 6 Mont. 180; Solomon v. Chesley, 59 N. H. 24; Livingston v. Exum, 19 S. C. 223; Nimocks v. Welles, 42 Kan. 39; Underhill v. Spencer, 25 id. 71;

Cook v. Chapman, 41 N. J. Eq. 152; Randall v. Carpenter, 88 N. Y. 293; Lyon v. Hersey, 32 Hun, 253.

<sup>2</sup> Bullock v. Ferguson, 30 Ala. 227. Nor costs on appeal. Woodson v. Johns, 3 Munf. 230; Guilford v. Cornell, 4 Abb. 220. But see *infra*.

<sup>3</sup> See *ante*, vol. 1, § 88; McDonald v. James, 47 How. Pr. 474; Hovey v. Rubber Tip P. Co., 50 N. Y. 335; Smith v. Day, 21 Ch. Div. 421.

<sup>4</sup> Dunn v. Davis, 37 Ala. 95.

<sup>5</sup> In Crounse v. Syracuse, etc. R. Co., 32 Hun, 497, the expense of hiring a special train in order to secure a prompt dissolution of an injunction was recovered, the circumstances being peculiar. Defendant's personal expenses were allowed. But these as well as defendant's claims for his services are denied in some cases. Lyon v. Hersey, 32 Hun, 253; Cook v. Chapman, 41 N. J. Eq. 152; Galveston, etc. Ry. Co. v. Ware, 74 Texas, 47.

In Edwards v. Bodine, 11 Paige,

the employment of counsel is such, for obtaining relief from an injunction; and hence the bond is almost universally construed to include expenses for such service.<sup>1</sup> It is otherwise, however, in Arkansas, Maryland, Texas and in the federal courts.<sup>2</sup> Counsel fees will not be denied in a state court be-

223, a sale under a decree of foreclosure was restrained. On the dissolution of the injunction it was held that under the thirty-first chancery rule, fees were properly allowed for services in relation to the sale which would necessarily have to be performed a second time, and also the expense of re-advertising the sale, counsel fees in procuring a dissolution of the injunction, and taxable costs. It was improper to allow, as the master in chancery had done, fees for commissions on a sale not made, for the personal services, etc., of the parties in attending the sale and going to see and consult with counsel and the charge of the solicitor for attending to advise them at the sale. *Baggett v. Beard*, 43 Miss. 120; *Brown v. Jones*, 5 Nev. 374; *Raupman v. Evansville*, 44 Ind. 392; *Campbell v. Metcalf*, 1 Mont. 379; *State v. Thatcher*, 56 Ill. 257; *Tamara v. Southern Ill. University*, 54 Ill. 334; *Willetts v. Scoville*, 4 Abb. 415; *Fitzpatrick v. Flagg*, 12 Abb. 189; *Bolling v. Tate*, 65 Ala. 417.

<sup>1</sup> See cases in first three notes to this section.

<sup>2</sup> *Oliphint v. Mansfield*, 35 Ark. 191; *Wallis v. Dilley*, 7 Md. 237; *Wood v. State*, 66 id. 61; *Galveston, etc. Ry. Co. v. Ware*, 74 Texas, 47; *Browning v. Porter*, 2 McCrary, 581; *Oelrichs v. Spain*, 15 Wall. 211.

In the last case the bond was required to contain a condition "to pay the defendants such costs and damages as they may respectively sustain," and as executed it substantially conformed to the order. The

case was heard on the merits "four years, eight months and sixteen days after the injunction issued"—as the reporter very precisely mentions,—and the decree dissolved the injunction. Swayne, J., delivered the opinion: "Upon looking into the report, we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as part of the damages covered by the bonds. . . . The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to (*Day v. Woodworth*, 13 How. 370), and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered; but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to

cause the bond was given in a suit pending in a federal court. It will not be assumed that because the federal courts do not allow such fees that the sureties contracted with that rule of law in view.<sup>1</sup> The amount recoverable is not limited to [68] the rates at which the fees would be taxed as costs.<sup>2</sup> On the other hand, the sum to be allowed is not to be controlled by the agreement between the defendant and his attorney; it cannot exceed a reasonable sum for the service rendered.<sup>3</sup> The usual and customary fee for like services and the agreement are the elements by which the allowance is to be measured.<sup>4</sup> Courts will exercise vigilance to keep the liability of the plaintiff within just and reasonable limits.<sup>5</sup> Hence, if a modification of the injunction is all that a defendant is entitled to and he secures nothing further, there can be no recovery for services in attempting to obtain its dissolution;<sup>6</sup> and if the petition is insufficient to authorize the issuing of the writ, no allowance will be made for services in preparing affidavits to show that the merits are against the plaintiff.<sup>7</sup>

§ 525. **Same subject.** The authorities are not agreed on the point whether the party seeking to recover for attorneys' fees and expenses must have actually paid them, or may recover where he has merely become liable.<sup>8</sup> But on principle, and according to the general course of decision in analogous cases, the expenses incurred, and for which the plaintiff is

a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law, and sound public policy."

<sup>1</sup> *Mitchell v. Hawley*, 79 Cal. 301; *Aiken v. Leathers*, 40 La. Ann. 23; *Wash v. Lackland*, 8 Mo. App. 122, and Missouri cases cited on p. 124.

<sup>2</sup> *Wilde v. Joel*, 6 Duer, 671.

<sup>3</sup> *Wittich v. O'Neal*, 23 Fla. 592.

<sup>4</sup> *Stinnett v. Wilson*, 19 Ill. App. 38; *Jevne v. Osgood*, 57 Ill. 340, 347.

<sup>5</sup> *Cook v. Chapman*, 41 N. J. Eq. 152 (setting aside an allowance as excessive).

The amount is largely discretionary with the trial court. An allowance will not be reversed merely because it is less than the sum fixed by any witness. *Lichtenstadt v. Fleisher*, 22 Ill. App. 92.

<sup>6</sup> *Ford v. Loomis*, 62 Iowa, 586.

<sup>7</sup> *Ellwood Manuf. Co. v. Rankin*, 70 Iowa, 403.

<sup>8</sup> *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11; *S. C.*, 13 Cal. 585; *McRae v. Brown*, 12 La. Ann. 181; *Mills v. Jones*, 9 id. 11; *Wilde v. Joel*, 6 Duer, 671.



liable, should be included.<sup>1</sup> Where, however, the attorneys' fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incident to that result, they are not damages sustained by reason of the injunction.<sup>2</sup> The reason is obvious: expenses for another purpose, and which would have to be incurred whether a preliminary injunction had been granted or not, cannot be set down to the account of the injunction. But where no other relief is asked for but an injunction, the expense to get rid of it on a final hearing, as well as on motion, may be recovered.<sup>3</sup> It was formerly the rule in Alabama that counsel fees in the appellate court were not recoverable, though the appeal was from a judgment sustaining the injunction, and such judgment was reversed;<sup>4</sup> the contrary is now well established.<sup>5</sup> Generally no distinction is made between such fees in the trial and appellate courts;<sup>6</sup> though an allowance will not be made when the appeal is from the order of dissolution.<sup>7</sup> In

<sup>1</sup> Wittich v. O'Neal, 22 Fla. 592; Underhill v. Spencer, 25 Kan. 71; Garrett v. Logan, 19 Ala. 344; Miller v. Garrett, 35 id. 96; Brown v. Jones, 5 Nev. 374; Noble v. Arnold, 23 Ohio St. 264; Steele v. Thatcher, 56 Ill. 257; Leisse v. Railroad Co., 2 Mo. App. 105; Crounse v. Syracuse, etc. R. Co., 32 Hun, 497; Meaux v. Pittman, 35 La. Ann. 360. See vol. 1, § 85.

<sup>2</sup> Walker v. Pritchard, 135 Ill. 103; Noble v. Arnold, 23 Ohio St. 264; Hovey v. Rubber Tip P. Co., 50 N. Y. 335; Disbrow v. Garcia, 52 N. Y. 654; Langworthy v. McKelvey, 25 Iowa, 48; McDonald v. James, 47 How. Pr. 474; Bolling v. Tate, 65 Ala. 417; Bustamente v. Stewart, 55 Cal. 115; Blair v. Reading, 99 Ill. 600, 615; Gerard v. Gateau, 15 Ill. App. 520; McQuown v. Law, 18 id. 34; Moriarty v. Galt, 23 id. 213; Swan v. Timmons, 81 Ind. 243; New Nat. Turnpike Co. v. Dulaney, 86 Ky. 516; Burgen v. Sharer, 14 B. Mon. 497; Aiken v. Leathers, 40 La. Ann. 23;

Lemeunier v. McCleary, 41 id. 411; Thurston v. Haskell, 81 Me. 303; Lamb v. Shaw, 43 Minn. 507; Parker v. Bond, 5 Mont. 1; Newton v. Russell, 87 N. Y. 527; Randall v. Carpenter, 88 id. 293; Olds v. Cary, 13 Ore. 362; Hill v. Thomas, 19 S. C. 230; Lillie v. Lillie, 55 Vt. 470.

If, however, extra expense has been occasioned the defendant by reason of the injunction it may be recovered. Wallace v. York, 45 Iowa, 81; Olds v. Cary, 13 Ore. 362.

<sup>3</sup> Andrews v. Glenville Woolen Co., 50 N. Y. 282; Newton v. Russell, 24 Hun, 40; Reece v. Northway, 58 Iowa, 187.

<sup>4</sup> Ferguson v. Baber, 24 Ala. 402; Bullock v. Ferguson, 30 id. 227.

<sup>5</sup> Bolling v. Tate, 65 Ala. 417; Cooper v. Hames, 93 id. 280.

<sup>6</sup> Lambert v. Haskell, 80 Cal. 611; Porter v. Hopkins, 63 id. 53; Reece v. Northway, 58 Iowa, 197.

<sup>7</sup> Ellwood Manuf. Co. v. Rankin, 70 Iowa, 403.

a case<sup>1</sup> where the injunction was not disallowed until the final hearing the party enjoined recovered also the expenses of an unsuccessful motion to dissolve; and on this point Rapallo, J., said: "It (that motion) was not denied on the merits, nor for any irregularity in making the motion, but because the court in its discretion thought it more advisable to defer the inquiry into the merits until the final hearing. It was proper that the defendant should move at the earliest [69] opportunity to dissolve the injunction. His motion did not fail through any fault on his part, or any defect in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result, which, for the purposes of this application, may be assumed to be correct, shows that if the decision had not been thus deferred the motion should have been granted when made." Those expenses were allowed under these exceptional circumstances; for, as Church, C. J., remarked in a subsequent case,<sup>2</sup> "a motion had been made to dissolve the injunction, which was denied upon the ground that, as the motion involved the whole merits of the action which was brought to secure a permanent injunction, it was more appropriate that it should be determined upon a trial. The defendant was therefore compelled to go to trial to secure a decision that the party was not entitled to the injunction in order to recover the damages which he had sustained in endeavoring to procure a dissolution."<sup>3</sup> Generally the costs and expenses of an unsuccessful application to dissolve will not be allowed though the motion is regular, and the court in its discretion continues the injunction to the final hearing, and then dissolves it on the merits.<sup>4</sup> This is the rule where a gross sum was paid as counsel fees, no separate charge being made for a futile attempt to procure a dissolution.<sup>5</sup> Not only are the costs and expenses incurred directly to obtain dissolution of the injunction allowed as damages, but also those which are incident to executing the references that courts of equity in many jurisdictions direct under local stat-

<sup>1</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282. in *Troxell v. Haynes*, 16 Abb. (N. S.) 1; *Langworthy v. McKelvey*, 25

<sup>2</sup> *Hovey v. Rubber Tip P. Co.*, 50 N. Y. 335. Iowa, 48.

<sup>4</sup> *Allen v. Brown*, 5 Lans. 511.

<sup>3</sup> See comments on the same case

<sup>5</sup> *Mitchell v. Hawley*, 79 Cal. 301.

utes or rules of practice to ascertain the damages sustained by the enjoined party in consequence of the injunction.<sup>1</sup>

§ 526. **Damages from restraint of injunction.** The damages which the enjoined party may be entitled to for losses and injuries sustained by the operation of the writ are as various as the subjects which may be affected by its restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual [70] loss, which is the natural and proximate result of the injunction.<sup>2</sup> The damages contemplated by the law in requiring a bond are such as are real; merely nominal damages cannot be recovered.<sup>3</sup> The sum designated is the limit of liability,<sup>4</sup> except where interest is allowed from the time of the breach.<sup>5</sup> Bonds are not to be extended in their operation by liberal construction. If, however, their terms are clear they will be given effect to, though by so doing the obligors are made liable for damages sustained before they executed their obligation.<sup>6</sup> The liability of the sureties is confined to responsibility for the direct effects of the injunction. Illustrations of this have been given in stating the rule concerning attorneys' fees. The importance of the question merits further consideration. If two persons are enjoined one of them cannot recover on the bond because of the inability of the other to fulfill a pre-existing contract between them, though but for the injunction there might have been no default.<sup>7</sup> The defendant cannot recover damages caused by a lessee refusing to abide by the terms of his lease because of consequences following an injunction. In a recent case the

<sup>1</sup> *Holcomb v. Rice*, 119 N. Y. 598; *Lawton v. Green*, 64 id. 326; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Rose v. Post*, 56 N. Y. 603; *Ryan v. Anderson*, 24 Ill. 652.

<sup>2</sup> *Bullock v. Ferguson*, 30 Ala. 227; *Collins v. Sinclair*, 51 Ill. 328; *Hale v. Meegan*, 39 Mo. 272; *Brown v. Tyler*, 34 Tex. 168; *Moulton v. Richardson*, 49 N. H. 75; *Hurd v. Trimble*, 1 Litt. 413; *Galveston, etc. Ry. Co. v. Ware*, 74 Texas, 47.

In Louisiana punitive damages are recoverable under some circum-

stances. *Conery v. Coons*, 33 La. Ann. 372.

<sup>3</sup> *Foster v. Stafford Nat. Bank*, 58 Vt. 658; *Smith v. Day*, 21 Ch. Div. 421.

<sup>4</sup> *Pacific Mail Steamship Co. v. Toel*, 9 Daly, 201; *Glover v. McGaffey*, 56 Vt. 294.

<sup>5</sup> *Perry v. Horn*, 22 W. Va. 381. See vol. 1, § 331; vol. 2, §§ 477, 478.

<sup>6</sup> *Meyers v. Block*, 120 U. S. 206; *Block v. Myers*, 35 La. Ann. 220; *Goodrich v. Foster*, 131 Mass. 217.

<sup>7</sup> *Livingston v. Exum*, 19 S. C. 223.

erection of a building was restrained. The owner sought to recover damages on the ground that he thereby lost a tenant. The court thought that no binding lease had been entered into; but nevertheless considered the case as if it were otherwise. Jessel, M. R., was of the opinion that the damage was the difference between the rent agreed to be paid by the lessee and the value of the expectation of rent to be received from some other tenant. "Is that a kind of damage as to which the court should direct an inquiry? It seems to me that it is not." Brett, L. J., said: "If damages are granted at all, I think the court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shown in *Hadley v. Baxendale*.<sup>1</sup> If the injunction had been obtained fraudulently or maliciously, the court, I think, would act by analogy to the rule in case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless, as in *Hadley v. Baxendale*, notice had been given to the opposite party of there being some particular contract which would be affected by the breach. This doctrine of notice has introduced some difficulty into these cases, and it is not settled what sort of notice is sufficient. Here an alleged agreement for a lease is relied on. In the first place I do not think the existence of such agreement proved. If it did exist, the next question is, whether the injunction so interfered with the erection of the buildings as to entitle the tenant to throw up the agreement. I am not satisfied that it did. But assume that it did, and that the agreement was broken in consequence of the injunction, still I agree with the vice-chancellor in thinking that the breach is not by reason of the injunction, but is a consequence too remote to be regarded. If any one obtains an injunction preventing another from proceeding with a building, he must be taken to have notice of everything in the building contract, and all liabilities which the

<sup>1</sup> 9 Exch. 341.



person stopped incurs to his contractor by reason of the stoppage are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote." Cotton, L. J., was of the same opinion.<sup>1</sup> There can be no recovery for the mental strain and anxiety resulting from an injunction.<sup>2</sup>

§ 527. **Same subject.** If the restraint keeps the owner of property out of possession or deprives him of its use, compensation is given upon the same principle as in other cases of wrongful deprivation.<sup>3</sup> Where a party was prevented from enjoying the benefit of his real estate by an injunction obtained without cause, the value of the use and occupation was given as damages.<sup>4</sup> In a recent case the court announced that in awarding damages for depriving the person entitled thereto of the use of his land equitable principles would control. The award made included damages for the loss of the crop.<sup>5</sup> There may also be a recovery for waste committed while the owner is kept out of possession.<sup>6</sup> But an injunction interfering with the collection of rents due does not change the legal relation of landlord and tenant so as to entitle the former to recover for use and occupation; the true basis of recovery is the losses from the insolvency of the tenants during the pendency of the injunction. In a case where a landlord was restrained from interfering with the possession of real estate occupied by tenants, it was held that the inquiry of damages should be, what rent has the defendant lost by reason of the injunction? If the tenants were and are still responsible, then their covenant can be enforced and the rent recovered, and there would be no actual loss. If, however, they have become irresponsible or have abandoned the premises pending the injunction, or the premises, or any part of them, were unoccupied and might have been rented, there may be a claim for the loss of rent. In short,

<sup>1</sup> Smith v. Day, 21 Ch. Div. 421.

<sup>2</sup> Cook v. Chapman, 41 N. J. Eq. 152.

<sup>3</sup> See Dreyfus v. Peruvian Guano Co., 42 Ch. Div. 66.

<sup>4</sup> Rutherford v. Mason, 24 Ind. 311; Fleming v. Bailey, 44 Miss. 132. See Sturges v. Knapp, 36 Vt. 439, where

damages were assessed and distributed upon peculiar facts; also Johnson v. Moser, 72 Iowa, 654.

<sup>5</sup> Rice v. Cook, 92 Cal. 144; Edwards v. Edwards, 31 Ill. 474; Richardson v. Allen, 74 Ga. 719.

<sup>6</sup> Richardson v. Allen, 74 Ga. 719.

the loss must be ascertained in view of the responsibility of the parties and their several remedies; and also in view of the condition of the premises and the landlord's ability to have leased them or collected rent while the injunction continued, which he is unable now to do by reason of the irresponsibility of the tenants or by reason of the premises being unoccupied: for such items the defendants should recover as the legitimate damages sustained by reason of the injunction. If the plaintiff, pending the action, collected any rent of the tenants, the amount will form part of the damages.<sup>1</sup> Where the injunction prevented the owner from clearing away certain timber [71] upon agricultural lands, the damages for the delay were held too remote and consequential.<sup>2</sup> A party so prevented from working on a lead mine, and thereby kept out of employment, was treated as having a just demand for damages on the basis of a loss of time to be compensated at the usual rate of wages.<sup>3</sup> But in Nevada it was held that where an injunction was obtained to restrain a party from cutting and drawing wood, neither the loss occasioned by reason of his cattle or wagon being thrown out of employment, the expense of making a road which became useless, nor the injury to his credit could be taken into consideration.<sup>4</sup> Damages which result from a forced suspension of work and from the inability, as a result of the injunction, to take steps to protect the result of labor performed from injury by the elements are recoverable.<sup>5</sup>

<sup>1</sup> *Rosenthal v. Boaz*, 27 Ill. App. 430; *McDonald v. James*, 47 How. Pr. 474.

<sup>2</sup> *McKenzie v. Mathews*, 59 Mo. 99. See *Bullard v. Harkness* (Iowa), 49 N. W. Rep. 855; *Colby v. Meserve* (Iowa), 52 id. 499.

<sup>3</sup> *Muller v. Fern*, 35 Iowa, 420.

<sup>4</sup> *Brown v. Jones*, 5 Nev. 374.

In *Gear v. Shaw*, 1 Pin. (Wis.) 608, an injunction was granted to restrain parties from mining on a certain lot; some time after its dissolution a new mineral discovery was made on the lot and a large quantity of ore was raised. In assessing damages on the injunction bond it was held that proof for the purpose of enhancing damages that the use of the money for

which the mineral might have been sold was worth more than the legal rate of interest should be rejected as ideal and speculative; and so, too, the proof of such subsequent discovery for the purpose of showing what the enjoined parties in the absence of the injunction might have realized.

Where the building of a private road was enjoined, and after dissolution the work was prosecuted, it was held that, had the road been finished after the removal of the injunction at an increased cost, such additional expense would have been a proper subject of damages. *Morgan v. Negley*, 53 Pa. St. 153.

<sup>5</sup> *Dougherty v. Dore*, 63 Cal. 170.

If an owner is thus deprived of his personal property, he is *prima facie* entitled to recover its value; and this measure of redress has been allowed where the party obtaining the writ, during its pendency, took possession of the property, destroyed its identity, and converted it to his own use.<sup>1</sup> It may admit of some doubt whether the loss of the property in such a case proceeds from the injunction. The writ stayed the defendant, but it vested no possession or right of control in the plaintiff.<sup>2</sup> [72] His seizure of the property was an independent tort, and not the natural and proximate consequence of the injunction except as the restraint prevented the owner from protecting it.<sup>3</sup> But it must be confessed that the ground of liability on the bond is stated with force and plausibility by Denio, C. J.:<sup>4</sup> "This seems to me a very plain case. The plaintiff claiming to be the owner of personal property lying on the defendants' land sued the defendants, who also claimed to own that personal property, to establish his title, and he procured a preliminary injunction forbidding the defendants from asserting their alleged ownership, by suit in court or in any other way, pending the principal suit; but he was finally beaten, the court determining that the property belonged to the defendants and not to the plaintiff. In the meantime, while the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use; and the question is, what damages the defendants have suffered in consequence of this proceeding of the plaintiff. The object and the effect of the judgment manifestly was to allow the plaintiff to carry off and dispose of the property while the defendants, who were, as the event has shown, its owners, were precluded from doing anything

<sup>1</sup> Barton v. Fish, 30 N. Y. 166.

<sup>2</sup> In Patterson v. Kingsland, 8 Blatchf. 278, P., a mortgagee of real estate, sued K. to recover damages for the removal from the mortgaged premises of a building which K. had erected thereon under an agreement with the owner, and had removed therefrom after the execution of the mortgage. When K. had removed the building to some distance, P. obtained an injunction restraining its

further removal. The building was subsequently blown down by the wind. It was held that P. did not, by obtaining such injunction, take control of the building so that he could be charged with its value where it then stood, nor was the obligation imposed on him to assume possession and replace it on the land.

<sup>3</sup> See Ashley v. Harrison, 1 Esp. 48; Vickers v. Wilcocks, 8 East, 1.

<sup>4</sup> Barton v. Fish, 30 N. Y. 166.

whatever, in court or out of court, to protect themselves in its possession. *Prima facie*, the value of the property which the defendants have lost was the measure of the defendants' damages. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use *pendente lite* and from any depreciation in value. But under the existing facts, it is the same thing as though it had been destroyed while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is that the loss was not occasioned by the injunction but by the tortious act of the plaintiff and his assistant unconnected with that process. This is too narrow a view of the question. [73] If it had been carried off and converted by a stranger while the owners were prohibited from doing anything to protect it, the person who restrained them ought to make recompense for the loss. *A fortiori*, he should make the compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to take care of and preserve that which was their own." It was said in another case in New York, where a lessor had been enjoined from collecting rents, that if the plaintiff, pending the action, collected rent of the tenants, the amount so collected would form part of the damages.<sup>1</sup> And damages were given in an Illinois case on the same principle.<sup>2</sup> A lessee of farming lands sued out an injunction against a prior lessee to prevent him from harvesting a crop of rye which he had sown while in possession under a lease requiring him to give one-third of the crop as rent; the plaintiff harvested the rye himself, and the court, at the hearing, having found that two-thirds of the rye belonged to the defendant, dissolved the injunction and assessed as damages the value of the two-thirds, after deducting the expense of harvesting the whole crop.<sup>3</sup>

§ 528. **Same subject.** Where the writ does not operate to change the possession and does not result in a loss of the

<sup>1</sup> McDonald v. James, 47 How. Pr. 474.

<sup>2</sup> Collins v. Sinclair, 51 Ill. 323.

<sup>3</sup> Id.



chattels, but suspends the owner's control, the amount properly recoverable on the bond is the loss in the value during the operation of the injunction, not exceeding the penalty, with interest from the institution of the suit.<sup>1</sup> This damage is the difference between the value of the property at the time when the bond was given and its value at the time the injunction was dissolved, together with interest.<sup>2</sup> Profits which would have been made if an established business had not been interfered with may be recovered.<sup>3</sup> An injunction may prejudice a cred-

<sup>1</sup> *Levy v. Taylor*, 24 Md. 282; *Meyensburg v. Schlieper*, 48 Mo. 426-440.

If the owner is deprived of the use of property he may recover the rental value of it and the amount paid to an employee who was in charge of it under a subsisting contract, and for the expense of taking care of it while it was idle. *Wood v. State*, 66 Md. 61.

If the sale of real estate has been prevented the damages may be proved by showing the depreciation in its value; but a recovery cannot be had unless there is proof of a *bona fide* application to buy, and that the injunction prevented the sale. *Sturges v. Hart*, 45 Ill. 103; *Reece v. Northway*, 58 Iowa, 187.

<sup>2</sup> *Brandamour v. Trant*, 45 Ill. 372; *Rubon v. Stephan*, 25 Miss. 253; *Levy v. Taylor*, 24 Md. 282; *Mansell v. British Linen Co. Bank* [1892], 3 Ch. 159. In the last case an injunction was issued restraining the sale of shares of stock. Prior to the dissolution of the injunction the holder asked that the shares might be sold and the proceeds paid into court. The plaintiff successfully resisted that application. His liability was measured not by the difference between the value of the shares when the action was dismissed and the highest market price between that time and the issuance of the writ, but by the difference in their value between the time of the restraint

and the denial of the motion for their sale.

<sup>3</sup> *Lambert v. Haskell*, 80 Cal. 611.

In *Lehman v. McQuown*, 31 Fed. Rep. 138 (Brewer, J.), personal property sold at a sheriff's sale was bought by the debtor's wife for less than its value. A creditor obtained the appointment of a receiver and an injunction to restrain interference, on the ground that the sale was not *bona fide*. The contrary was established; the receiver settled his accounts and turned over the property unsold to the purchaser, who sought to recover damages upon the creditor's injunction bond for the interruption of her possession. The property in question was a stock of wall-paper, and possession of it was taken in April and not surrendered until July. The claim for damages embraced, among other items, these: depreciation in value of the stock; injury to credit; loss of custom; the sale by the receiver of portions of a single pattern of the paper so as to leave broken and fragmentary pieces. As to the decline in value of the stock, the court said the claim must have been made "upon the assumption that the property, at the time it was taken possession of, could instantly be converted into money, and the illustration which was very forcibly put by counsel was of wheat. It is taken possession of to-day, when its market value is so much; it is held

itor by hindering and delaying the prosecution of a suit until the debtor becomes insolvent, and by the loss or depreciation of property on which his debt is secured by delaying the sale of it, and also by increasing costs and expenses. Such [74] losses are covered by the injunction bond.<sup>1</sup> In one case the

for four months; its market value goes down. Certainly that diminution in value is something of which the party has a right to complain. But it was admitted on the hearing last fall, in reference to the taxation of costs, that the receiver had acted prudently. He had a stock of goods which he had done the best he could to dispose of, and if he had not fully succeeded then it was because it was property which could not be thrown at once on the market and converted into money at anything like its value. As shown by the very result of the sheriff's sale, it was not property for which one could go out on the street and find a purchaser in the open market, and if the receiver has disposed of that property, or so much as he did, in the best manner he could, and in a manner which was commended by both parties, and for cash, it would not be fair to hold that, because he did not succeed in disposing of all the property, the complainant is to be charged with the difference between the value in April and in July of that undisposed of." The testimony concerning the loss of profits was not clear enough to warrant an allowance therefor. The claim on account of the manner in which the receiver made his sales was rejected on the ground that his accounts had been approved and he discharged. A recovery was had of \$250 and costs for damages for the interruption of possession.

<sup>1</sup> Bolling v. Tate, 65 Ala. 417.

A partner who has been enjoined from collecting firm assets may re-

cover his share of those which were solvent at the time the injunction issued and subsequently became insolvent or barred by the statute while the restraint continued. *Terrell v. Ingersoll*, 10 Lea (Tenn.), 77.

If the enforcement of a decree is enjoined and the debt, the collection of which is thereby stayed, is not the complainant's, damages are not to be measured by the amount named in the decree, but are limited to such as resulted from the delay in its execution. *Moore v. Hallum*, 1 Lea, 511; *Staples v. White*, 88 Tenn. 30.

In *Aldrich v. Reynolds*, 1 Barb. Ch. 613, a mortgage foreclosure by advertisement was enjoined; and on a dissolution of the injunction there was a reference to ascertain the amount of damages sustained by the defendant by reason of the injunction. He held a bond and mortgage upon a farm in the possession of the complainant, and advertised a sale to take place on the 5th of June, 1845. It appeared on the reference that on the 5th of June the crops and grass upon the premises, and which were afterwards taken off by the complainant during the continuance of the injunction, were worth \$90.30, exclusive of the labor and expense of protecting, gathering and securing them. There was a deficiency of \$100 when the sale took place soon after the dissolution of the injunction. The master allowed as part of the damages \$90.30, the value of the crop and grass taken by the complainant during the time the sale was stayed. He also allowed

principal defendant had filed his bill in equity and obtained a temporary injunction to stay the plaintiff's action at law against him. He failed to maintain his bill, and thereby became liable on his bond. The reasonable damages which the party enjoined was entitled to recover were the legal taxable costs both in the suit at law and on the bill in equity during the time he was delayed by the injunction, provided he had not or could not realize the same on the original proceedings against such principal defendant; also, his reasonable counsel fees which he was liable to pay in both of the original cases for the same time. He could not recover as damages under his bond the interest accruing on the original note in the suit at law unless it appeared that the debtor had become insolvent since the injunction, or that the creditor had suffered damage equal to such interest without fault.<sup>1</sup>

the interest upon the amount due from the 5th of June until the injunction was dissolved, and the extra expense of continuing the notice of sale during the time the sale was suspended by the injunction; and the taxable costs of the defendant in obtaining a dissolution of the injunction, and upon the reference, as well as \$25 which had been paid by the defendant as an extra counsel fee in obtaining such dissolution. The chancellor held that the crops growing upon the premises would have gone to the purchaser if a sale had been made on the 5th of June, and therefore a sale at that time would have brought \$90.30 more than after they had been removed, and hence would have produced just about the amount of the mortgage, with the interest and costs of foreclosure. "The defendant, therefore, lost not only the difference between what the lot would have brought in June, and that for which it was actually sold after the injunction had enabled the mortgagor to strip it of its crops and grass, but also the interest on the amount which he would have

been entitled to receive if the sale had taken place on the 5th of June." The report of the referee was affirmed.

<sup>1</sup> *Derry Bank v. Heath*, 45 N. H. 524; *Redderburger v. McDaniel*, 38 Mo. 138; *Tryon v. Robinson*, 10 Rich. L. 160; *Willett v. Scovill*, 4 Abb. 405; *Edwards v. Pope*, 4 Ill. 465.

In *Kennedy v. Hammond*, 16 Mo. 341, A. conveyed to B. a mill and leasehold to secure C. the payment of two notes. After the first and before the second note matured the property was advertised and sold pursuant to the deed of trust; D. became the purchaser. After the sale D. tendered to B. the amount of the note which had matured, and produced the receipt of the assignees of the grantor for the balance of his bid and demanded a deed. B. refused to deliver a deed, and when the second note became due again advertised the property for sale. D. applied for and obtained an injunction. When it was dissolved the lease had been declared forfeited and the mill had burned down, so that the mortgaged interest would not

§ 529. What facts no defense. Want of jurisdiction [77] in the court over the subject-matter of the action does not deprive the defendant of the right to damages on the under-

have sold for enough to defray the expenses of a sale. Held, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes with interest, etc., even though their makers were solvent.

A statute of Missouri required an injunction bond "to secure the amount, or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the complainant shall abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." Another provision was that "if money shall be enjoined, the damages thereon shall not exceed ten per cent. on the amount released by the dissolution, exclusive of legal interest and costs." The rule of ten per cent. held not to apply. Ryland, J., said: "Here the complainant did not seek to enjoin and restrain the defendants from the collection of a judgment or of a sum of money, but to prevent them from proceeding to sell property, the trust fund; and by that act, on the part of the complainant, serious injury may have been committed; no less than the destruction, in a greater or less degree, of the value of the entire fund; and can it be said that ten per cent. is to be the amount of damages to be awarded, on the dissolution of the injunction in such cases? Ten per cent. on what? The original debt, for the payment of which the trust was made? That will not do. Nor can the defendants be compelled to resort to the bond on which that in-

junction was originally allowed. The condition of the bond is, 'pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved.' Now, before suing on this bond, after dissolution, the damages must be adjudged, and the non-payment of the amount adjudged forms the breach of the bond so far as damages are concerned. . . . At the maturity of the second note steps were taken to sell the trust property; then the complainant steps in and by his bill prevents the sale by injunction. Upon the dissolution of this injunction, the trust property being destroyed partly by fire, and the lease forfeited to the original lessor; the trust property, I may say, lost to the *cestui que trust*; the damages, in consequence, were assessed at the amount of the debt secured and interest, and I think very properly. Let us look at the facts in this case. Hall, Allen & Childs were the proprietors of the lease from Chambers of the steam saw-mill. They gave their deed of trust on the property to secure two notes. Afterwards Hall sold all his interest in the premises to Childs & Emerson, expressly subject to the debt mentioned in the trust deed. Then Allen sells his interest in the property to Childs & Emerson, in like manner subject to the payment of the debt. Then Childs transfers the property to Emerson subject to the payment of the debt. Lastly, Emerson transfers the property to John Maguire, in the same manner subject to the debt; so that Maguire becomes the owner of the property, and, in respect to the prior parties, is the principal



taking.<sup>1</sup> Nor will disobeying the writ defeat an action on the bond.<sup>2</sup> If a bond is conditioned to satisfy an execution the collection of which is enjoined, it is immaterial so far as the lia-

debtor, and they merely his securities to the holder of the trust deed. Maguire procures Kennedy to bid off the property at the trustee's sale, and prosecutes the present suit for his own benefit, using Kennedy's name. Maguire has all along been in possession, receiving a large rent, \$2,000 per year, until the mill was burned down in 1849. The deed of trust contained a stipulation that the premises should be insured, and that the insurance should stand as security to the creditor. Maguire collects the insurance for his own benefit. This, too, pending the injunction. So, too, pending the injunction, the landlord enters into the premises for a forfeiture, and Maguire suffers him to keep possession, and to make leases to other parties. Maguire, after making the trust debt his own, appropriates the security for the debt to his own use, and insists that the original Orris Hall shall look to the makers of the notes individually and not to the trust fund.

"The notes are still due; the trust property was sold; Maguire gets possession through Kennedy's purchase, pays no part of the debt for which the property was sold, rents out this very trust property for \$2,000 a year, and indemnifies Kennedy to prosecute this proceeding, in which the injunction was obtained. Had the second sale proceeded, the debt in all probability might have long ago been made out of the trust property. Pending this proceeding that prop-

erty has become lost to the *cestui que trust*; and because the original makers of the notes are supposed to be worth \$3,000, Maguire contends that the *cestui que trust* has not been damaged, and that he must look to the notes."

Yates v. Joyce, 11 Johns. 136, was held in the foregoing case not to have any or but slight application to any principle involved in the case under consideration. That was a suit by a judgment creditor whose judgment was a lien on land against a party who pulled down erections which were thereon. The court sustained the action on the principle that, "where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same."

In Lane v. Hitchcock, 14 Johns. 213, the court say: "This case is supposed to be within the principles of Yates v. Joyce, 11 Johns. 136. In the case now before us, proof was offered on the trial that the mortgagor was insolvent, and had no other property than the mortgaged premises out of which the debt of the plaintiff might be satisfied; but there was no averment in the declaration to warrant such proof. These were material and indispensable facts in order to give the plaintiff a right of action; and to allow this proof without the averment would take the defendant by surprise."

In St. Louis v. Alexander, 23 Mo.

<sup>1</sup> Alexander v. Gish, 88 Ky. 13; Cumberland Coal Co. v. Hoffman Coal Co., 15 Abb. 78; Hanna v. McKenzie, 5 B. Mon. 314. But see § 475, *ante*.

<sup>2</sup> Van Hoover v. Van Hoover, 18 Mo. App. 19; Colcord v. Sylvester, 66 Ill. 540.

bility of the sureties is concerned whether the property released was subject to execution or not, or whether the debt

484, an injunction was obtained by stockholders to restrain the sale under a trust deed of property, franchise, etc., belonging to the corporation. A statute provided that upon dissolution of an injunction in whole or in part, damages should be assessed by a jury, or, if neither party require a jury, by the court; but if money shall have been enjoined, the damages thereon shall not exceed ten per centum on the amount released by the dissolution, exclusive of legal interest and costs. The court say: "The injunction to stop the proceedings of a trustee to sell property under a deed of trust to pay a debt has not been considered such an injunction upon money as to authorize the assessment by the rule of per cent. laid down in that act alone. In the case of *Kennedy's Ex'r v. Hammond*, 16 Mo. 341, the court held that the damages in such a case were not limited to ten per cent. on the debt, but might extend to the full amount of the debt, if the loss to the creditor by the injunction extended so far. The meaning of the words, 'if money shall have been enjoined,' has been generally supposed to embrace injunctions upon the executions of judgments originated by the debtor therein against his creditor, and not such as restrain other acts whereby money may in consequence thereof be deferred in payment by the interposition of third parties. Upon an execution against a debtor's estate, the payment of which can be enforced out of all his property, and the justice of which has been settled by the law through the intervention of its officers and tribunals; if there be an interference by injunction, and it turn out to be without proper

cause, and is therefore removed, then damages not exceeding ten per cent. upon the amount released from the injunction may be a just penalty for improperly interfering; and a just recompense for the delay which such interference produced to the creditors. But such is not the case when a sale of trust property has been enjoined. Here the debt has been recognized by the parties only; the law has not adjudicated upon it. Then, when a sale is enjoined by a third party, and the court after a hearing dissolves the injunction, it becomes proper to ascertain the damages, not by the rule of per cent., but from the injury the creditor has sustained from the improper act of the party stepping in between the creditor and the debtor, and hindering and delaying the execution of the means provided to enforce payment. Suppose, in this case, that the trust property was not worth half the debt intended to be secured; would the delay in the sale of it, caused by injunction, authorize the court to give ten per cent. damages for the detention and non-payment of the whole debt? What injury has the creditor sustained by enjoining the sale of property not worth one-tenth of his debt? Again, suppose the injunction had caused the loss of the entire fund in trust; would ten per cent. on the debt be a proper amount of damages — the only amount which the law would recognize, although there be proof amply to show that the fund was in value equal to the debt? No. In all such cases the court or jury should determine the amount of injury by evidence before it or them as to the damages sustained; the probable amount that

has been lost by reason of the injunction.<sup>1</sup> The legal effect of an injunction bond is not lessened by a statute which continues a levy in force after an execution has been issued.<sup>2</sup> The sureties on an undertaking in an action to set aside a bond and mortgage cannot include as a payment the sum bid by them for the property on its sale under a foreclosure.<sup>3</sup> A defense is not made by showing that after the writ was dissolved another injunction was obtained.<sup>4</sup> If the defendant is restrained from doing several acts, and the bond is conditioned to pay such damages as he may sustain by reason of the injunction, the sureties are liable, though the restraint is continued as to one act, for all damages except such as were caused by his inability to perform in that particular.<sup>5</sup> Granting an extra allowance to the defendant upon giving leave to discontinue a suit in which an injunction had been obtained does not bar a recovery of damages upon the bond unless the allowance was so conditioned by the court which gave it.<sup>6</sup>

Where all damages covered by the bond or recoverable must be ascertained in the injunction suit,<sup>7</sup> and, *a fortiori*, if the bond is conditioned to pay such damages as shall be so ascertained, the sureties are bound by the action of the court in the ascertainment of the damages, and can raise no question as to its correctness in an action on the bond.<sup>8</sup> If that instrument is in terms for the benefit of persons who are not, but who ought to have been, parties, the sureties cannot deny their liability to them.<sup>9</sup> If several persons are interested in a suit, and the only defendant employs an attorney, the obligors on the bond will not be heard to allege that the attorney did not represent all such parties.<sup>10</sup> In England the undertaking extends to all the defendants, although one or more of them

would have been realized; the value of money at the time, and other circumstances tending to show the damages sustained by the creditor in consequence of the injunction."

<sup>1</sup> Riggan v. Crain, 86 Ky. 249.

<sup>2</sup> Pugh's Adm'r v. White, 78 Ky. 260.

<sup>3</sup> Holcomb v. Rice, 119 N. Y. 598.

<sup>4</sup> Swan v. Timmons, 81 Ind. 243.

<sup>5</sup> Pierson v. Ells, 46 Hun, 336.

<sup>6</sup> Howell v. Miller, 12 Daly (N. Y.),

277; Troxell v. Haynes, 5 id. 390; S. C., 16 Abb. (N. S.) 1.

<sup>7</sup> Roberts v. Fahs, 36 Ill. 268; Methodist Church v. Barker, 18 N. Y. 463; Blakeney v. Ferguson, 18 Ark. 347.

<sup>8</sup> Lothrop v. Southworth, 5 Mich. 436; Anderson v. Falconer, 30 Miss. 145; Lockwood v. Saffold, 1 Ga. 72.

<sup>9</sup> Alexander v. Gish, 88 Ky. 13.

<sup>10</sup> Nimocks v. Welles, 42 Kan. 39. See Fourth Nat. Bank v. Scott, 31 Hun, 301.

only may be restrained; but not to those who did not ask the court to require it.<sup>1</sup>

§ 530. **What may be shown in defense.** If an injunction rightfully awarded is properly dissolved, no damages can be recovered upon matters done or arising afterwards.<sup>2</sup> An injunction by order is a provisional remedy, temporary in character. It assumes a pending litigation in which all questions are to be settled by a judgment, and operates only until the final judgment is rendered. If by that a permanent injunction is granted, the temporary writ is ended; and this is equally so if a permanent one is denied.<sup>3</sup> As a general rule, an undertaking cannot be required where a final decree is made, upon which event the functions of a preliminary injunction cease. Consequently the sureties are not liable for damages subsequently accruing, although the final decree is reversed on appeal.<sup>4</sup> And if the injunction be dissolved before the merits are adjudicated, the obligors may show the facts in mitigation that would entitle the plaintiff in the injunction suit to the writ.<sup>5</sup> So where the injunction had been granted to stay a sale under execution, the subsequent reversal of the judgment on which the execution issued may be taken into consideration on the question of damages in an action on the injunction bond.<sup>6</sup>

The damages and expenses incurred by the real party in interest in procuring a dissolution will be presumed in law to have been incurred by the defendant on the record, and may be recovered in his name for the person beneficially interested.<sup>7</sup> The liability of the sureties does not extend to dam-

<sup>1</sup> *Tucker v. New Brunswick Trading Co.*, 44 Ch. Div. 249.

<sup>2</sup> *Taylor v. Bush*, 5 B. Mon. 84; *Massie v. Sebastian*, 4 Bibb, 433; *Anderson v. Wallace*, 6 T. B. Mon. 381; *Lampton v. Usher's Heirs*, 7 B. Mon. 57, 66.

<sup>3</sup> *Jackson v. Bunnell*, 113 N. Y. 216.

<sup>4</sup> *Lambert v. Haskell*, 80 Cal. 611, 625; *Webster v. Wilcox*, 45 id. 302.

<sup>5</sup> *Stewart v. Miller*, 1 Mont. 301.

<sup>6</sup> *Fahs v. Roberts*, 54 Ill. 192.

In *Mahan v. Tydings*, 10 B. Mon. 351, it was held that in an injunction suit brought by executors in their

representative character, the bond given by such executors and their sureties only binds them to the extent of assets. See *Mills v. Forbes*, 12 How. Pr. 466.

<sup>7</sup> *Andrews v. Grenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip P. Co.*, id. 335.

In *Peerce v. Athey*, 4 W. Va. 22, where an injunction bond was joint as to the obligees, and joint and several as to the obligors, it was held that a joint action might be brought by the obligees and a joint judgment rendered for the whole of their de-



ages sustained by an assignee of the judgment;<sup>1</sup> nor to counsel fees paid or incurred by one of several defendants;<sup>2</sup> nor to damages resulting to the defendant from his misapprehension of the scope of the injunction.<sup>3</sup> It is a right possessed by the sureties to have the suit in which their bond was given disposed of according to the usual practice of the court; hence they are absolved from liability if, pursuant to a stipulation of the parties, it is determined at chambers after the close of the term.<sup>4</sup> In Indiana a restraining order made in vacation is not binding unless signed by the judge, and no liability attaches to the sureties upon a bond given pursuant to it.<sup>5</sup> If the statutes prescribe the conditions of a bond the sureties are not liable beyond the statutory measure although the language of their obligation is broader and clear;<sup>6</sup> the same rule applies if the extra-statutory condition was required by the court.<sup>7</sup> The presence of such a condition does not absolve the obligor from liability for the violation of such conditions as were authorized.<sup>8</sup>

## SECTION 8.

### APPEAL AND SUPERSEDEAS BONDS.

[79] § 531. **Their conditions.** There is considerable diversity in the conditions of these bonds and undertakings by the legislation of the different states; but in certain particu-

mand, although the claims due them respectively might be of different amounts and bear interest from different dates. But in *Fowler v. Frisbee*, 37 Cal. 34, where various persons were severally in possession of and cultivating in separate parcels a tract of land, and were sued jointly in ejectment to recover possession of the whole tract, and an injunction was obtained restraining them jointly from taking off the crops, it was held that such parties could not maintain a joint action for damages on the injunction bond, where the damages were not joint. See *Lally v. Wise*, 28 Cal. 539; *Browner v. Davis*, 15 id. 9; *Summers v. Farish*, 10 id. 347.

<sup>1</sup> *Burgett v. Paxton*, 15 Ill. App. 379.

<sup>2</sup> *Hildrup v. Brentano*, 16 Ill. App. 443; *Ovington v. Smith*, 78 Ill. 250; *Safford v. Miller*, 59 id. 205; *Burns v. Follansbee*, 20 Ill. App. 41.

<sup>3</sup> *Lillie v. Lillie*, 55 Vt. 470.

<sup>4</sup> *Baker v. Frelson*, 32 La. Ann. 822.

<sup>5</sup> *Kiser v. Lovett*, 106 Ind. 325.

<sup>6</sup> *Horton v. Cope*, 6 Lea, 155.

<sup>7</sup> *Moore v. Hallum*, 1 Lea, 511.

<sup>8</sup> *Slutter v. Kirkendall*, 100 Pa. St. 307; *Burrall v. Acker*, 23 Wend. 606; *Johnson v. Vaughan*, 9 B. Mon. 217; *Barnes v. Brookman*, 107 Ill. 317; *State v. Purcell*, 31 W. Va. 44; *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6.

lars there is extensively a substantial agreement. Under the practice which preceded the code, and in the federal courts, bonds on appeals and writs of error, which operate as a *supersedeas*, contain generally the conditions to prosecute the appeal or writ of error to effect, and if the judgment be affirmed in whole or in part, or the plaintiff in error or appellant fail to make his plea good, he shall answer all damages and costs.<sup>1</sup> A *supersedeas* bond with such a condition is strikingly analogous to the bond given by the plaintiff in replevin. In that action the plaintiff obtains possession of the property in question by giving a bond conditioned to prosecute the suit to effect; and when he fails in the performance of the condition he and his sureties are liable for the value of the property and interest thereon unless it is returned. So, by executing a *supersedeas* bond, a party against whom a money judgment or decree has been rendered, and who appeals or takes a writ of error, retains possession and enjoyment of the money in question subject to the same condition. On the breach of that condition there is a forfeiture of the bond, and the obligee is entitled to compensation, within the penalty, to the amount of the moneys so withheld and interest. In other words, the surety undertakes to pay the judgment if the condition of the bond is not fulfilled.<sup>2</sup>

§ 532. **Supersedeas bonds in federal supreme court.** By the twenty-second section of the judiciary act of 1789 [80] the judge signing the citation is required to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.<sup>3</sup> And since 1803, when provision for appeals in equity and admiralty cases was made, *supersedeas*

<sup>1</sup> The agreement to prosecute with effect means to do so with success. Legatee v. Marr, 8 Blackf. 404; Perreau v. Bevan, 5 B. & C. 291; Karthaus v. Owings, 6 H. & J. 134; Champomier v. Washington, 2 La. Ann. 1013. The condition is not satisfied if the appeal is dismissed for want of prosecution, though the judgment is not changed. Cook v. McCormack, 69 Iowa, 539; Trent v. Rhomberg, 66

Texas, 249. *Contra*, Hobart v. Hilliard, 11 Pick. 143. The performance of one condition is no defense to an action for the breach of another. Trent v. Rhomberg, *supra*.

<sup>2</sup> Graham v. Swigert, 12 B. Mon. 522; Ives v. Merchants' Bank, 12 How. (U. S.) 159; Sessions v. Pintard, 18 id. 106; Talbot v. Morton, 5 Litt. 326; Many v. Sizer, 6 Gray, 141.

<sup>3</sup> R. S., § 1000.

bonds in such cases have been subject to the same conditions. And the twenty-ninth rule of the supreme court of the United States, adopted in 1867, in accordance with the prior adjudications of the court, provided that *supersedeas* bonds in the circuit courts "must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his appeal or writ to effect, and answer all damages and costs if he fail to make his plea good." And this rule declared that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal." Under this rule the penalty of the bond would be ample for as large a recovery against the surety by action on the bond as the remedy by execution against the principal.<sup>1</sup>

It is said in one case that "it is not required that the security shall be in any fixed proportion to the decree. What is necessary is that it be sufficient."<sup>2</sup> In that case the decree below was for over \$300,000, and a bond had been required for double that amount. On a motion to reduce it, the appellate court, after making the remark which has been quoted, said: "We are satisfied that a bond in a much less amount will be entirely sufficient; and inasmuch as it appears that security in part for the amount they might be decreed to pay had been given by the present appellants, before the bond on appeal was required, by a deposit of bonds of the United States, and other private bonds, amounting in all to a sum not less than \$200,000, we will order that the appellants have leave to withdraw the appeal bond now on file, on filing a [81] bond in lieu thereof in the sum of \$225,000, with good and sufficient sureties." It will be observed that though the judgment was a money judgment, and rendered against the defendants personally, the court fixed the penalty at a less sum in consideration of there being other security. Hence there could not, for that reason, be a recovery against the sureties for the full sum of the judgment. It was not deemed

<sup>1</sup> See *Catlett v. Brodie*, 9 Wheat. 553; *Stafford v. Union Bank*, 16 How. (U. S.) 135; *S. C.*, 17 id. 175; *Rubber Co. v. Goodyear*, 6 Wall. 153; *French v. Shoemaker*, 12 id. 86; *George v. Bischoff*, 68 Ill. 236; *Roberts v. Cooper*, 19 How. (U. S.) 373.

<sup>2</sup> *Rubber Co. v. Goodyear*, *supra*.

necessary; but on affirmance of the judgment the bond would be available to the extent of the penalty unless the judgment had been so far otherwise satisfied that a sum less than that would completely discharge it. In an earlier case not unlike it in the fact of a personal judgment and collateral security, the court say: "The condition of the bond was 'for the prosecution of said appeal to effect, and to answer all damages and costs if' there should be a failure to make the plea good in the supreme court. There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship there may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed *pro rata* between them." The appellee "has a claim on both funds; first on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree."<sup>1</sup>

**§ 533. Liability if judgment is in part for money or in rem.** It is undoubtedly true that the *supersedeas* bond secures the amount of the judgment or decree rendered against the appellant or plaintiff in error personally to the extent of the penalty, even though there be other security. This is apparent from the authorities cited in the preceding notes. The sureties may be resorted to in the first instance, because [82] an action accrues against them on the forfeiture of the bond, and the value of the other security is no more to be considered in reduction of the amount to be recovered than the responsibility of a solvent principal.<sup>2</sup> Rule 29 of the supreme court, which has been referred to, formulates the law as generally held in other cases: "In all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where

<sup>1</sup>Sessions v. Pintard, 18 How. (U. S.) 106. The judgment was rendered on the bond for the full amount of the penalty before sale of the land which was security. The proceeds were applied to the original decree, and after such application there was

less due than the amount of the judgment on the bond. The latter was reduced accordingly by a receipt, and direction to collect on the execution only the balance.

<sup>2</sup>Sessions v. Pintard, 18 How. (U. S.) 106.



the property is in the custody of the marshal, under admiralty process, as in a case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

In a case decided prior to the adoption of this rule a bond had been given in a penalty of \$25,000 upon appeal from a decree in admiralty rendered for \$22,224; the decree had been affirmed with six per cent. damages, as well as costs. On return of the mandate, judgment had been entered for the original amount, and also for \$6,078.20 damages arising by reason of the appeal, and for \$529.98 costs. An amount about equal to eighty per cent. of the total sum for which execution was issued had been realized by sale of property attached when the proceeding was commenced, and on which a lien continued until sold. The deficiency exceeded the penalty of the *supersedeas* bond; and it was contended in behalf of the sureties that the proceeds of the sale should be applied ratably to every part of the demand, and thus reduce the damages and costs to about \$1,200. This view, however, was rejected. It was held that the surety was bound to pay such damages as might be awarded by the supreme court, and costs, and he could have been sued and judgment had against him had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part because of a payment made by his [83] principals, leaving an amount due equal to the bond. Mr. Justice Catron said: "This is the plain equity of the case. If the appeal had not been taken, and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below; and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned and which enlarged the amount."<sup>1</sup>

The bond required by the rule on an appeal from a decree

<sup>1</sup> *Ives v. Merchants' Bank*, 12 How. (U. S.) 159; *Sessions v. Pintard*, 18 id. 106.

for the foreclosure of a mortgage is not intended as security for either the amount of the decree or the interest accruing on the debt pending the appeal, but only for such damages as may arise from the delay incident to obtaining the judgment of the appellate court.<sup>1</sup> There is an intimation that the damages may be affected by the use and detention of the mortgaged property; but, as is said in a subsequent case, that was not the point in judgment.<sup>2</sup> The bond sued upon in a recent case contained the statutory words, "that the appellant shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all damages." It also contained an extra-statutory condition: And shall "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal." It was not competent for the parties to add to their rights or liabilities by virtue of this condition, and it was rejected. The rulings in *Jerome v. McCarter* and *Supervisors v. Kennicott* were approved; and it was held that the bond did not cover the balance due after applying the proceeds of the sale of the mortgaged property, nor the rents and profits thereof, nor the value of its use and detention pending the appeal. The liability was limited to the costs of the appeal and the deterioration or waste of property. It might extend to burdens resting upon it as the result of the non-payment of taxes and loss by fire, if it was not properly insured; but as to these last elements there was no occasion for their consideration. It is also suggested that there was doubt concerning liability for depreciation in the value of the property.<sup>3</sup> The supreme court of Massachusetts has ruled that an appeal bond in an equity suit in a federal court does not include damages for the rents and profits, or for the use and detention of land pending the appeal, unless there is a recovery therefor in the suit.<sup>4</sup>

§ 534. **Same subject.** The judgment in the appellate court for damages necessarily ascertains the sum that respondent is entitled to when he realizes the entire amount recovered.

<sup>1</sup> *Jerome v. McCarter*, 21 Wall. 17;  
*Supervisors v. Kennicott*, 103 U. S.  
554.

<sup>2</sup> *Kountze v. Omaha Hotel Co.*, 107  
U. S. 378.  
<sup>3</sup> *Id.*

<sup>4</sup> *Burgess v. Doble*, 149 Mass. 256.

If by reason of the appeal the original judgment is wholly or partially lost, that is an additional damage covered by the *supersedeas* bond, if the penalty is large enough. The bond is not for the damages awarded by the appellate court simply, but "all damages;" and hence when a judgment or decree is for the recovery of money not otherwise secured, the bond is required to be made an indemnity for the whole amount of the judgment, including just damages for the delay, and costs and interest on the appeal.

Where an intruder, ousted by judgment in *quo warranto* from an office having a fixed salary and of personal confidence, as distinguished from one merely ministerial, takes a writ of error, and by a *supersedeas* bond keeps himself in the office and in the enjoyment of the salary pending the writ, which he fails to prosecute successfully, in an action on the bond by the party who has the judgment of ouster the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and the consequent operation of the *supersedeas*.<sup>1</sup>

In a Kentucky case action was brought on a *supersedeas* bond given to stay execution pending a writ of error from the [84] supreme court of the United States, under the twenty-fifth section of the judiciary act, the decree being otherwise secured. The condition of the bond was to prosecute the writ to effect, or on failure to pay the amount of the original decree, with the damages and costs, and all damages, interest and costs that might be awarded in the appellate court. The condition, in terms, was broad enough to secure the payment of the amount of the decree, but the legal effect was discussed with reference to the condition which the law prescribed, and that was the same, substantially, as required by the laws of that state in case of appeals from judgments and decrees.

<sup>1</sup> United States v. Addison, 6 Wall. 291. It was also held in this case that the rule which measures damages upon breach of a contract for wages, or for freight, or for the loss of the rent of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where

the damage he is entitled to recover is the difference between the amount stipulated and the amount actually received, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical. See Lawlor v. Alton, 8 Irish L. 160.

Mr. Chief Justice Simpson, in delivering the opinion, said: "If it were substantially a decree against the defendants for money, then there can be no question that the law required them, in case they appealed, or suspended its execution by the *supersedeas*, to secure to the plaintiff the payment of the amount, and the bond imposes a liability to that extent upon the obligors." The court found the decree to be such, and the plaintiff entitled to full recovery against the sureties.<sup>1</sup>

<sup>1</sup> *Graham v. Swigert*, 12 B. Mon. 522. Some further observations of the chief justice will not be without value. He said: "The condition of the bond required by the act of congress is substantially the same as is required by the laws of this state in the case of appeals from judgments and decrees. It is, therefore, contended that the decisions of the court upon the effect of such bonds must determine the extent of the obligation of the surety in this case; and that, according to the principles of these decisions, he is not liable for the amount of the decree. . . . The cases referred to for the purpose of sustaining this proposition are *Talbot v. Morton*, 5 Litt. Rep. 326, and *Sumrall v. Reid*, 2 Dana, 65. In both of these cases an appeal was taken from a decree to foreclose a mortgage on real property, and subject it to sale for the payment of judgments at law. In the first it was held that the bond was sufficient, although it did not secure the payment of the judgment at law, as the decree was rendered against the mortgaged estate, and there was no decree for money. And the court in that case said it cannot be contemplated by law that the bond should secure the real estate or its value, or that accidents of fire and destruction of the estate are to be provided for in the bond. In the case of *Sumrall v. Reid* the appeal bond was conditioned to pay the amount recovered by the de-

cree and costs; and it was decided that there was nothing recovered by the decree, and it only subjected the real estate in the mortgage to the payment of a judgment at law; there was no liability on the surety for the debt. The principle attempted to be deduced from these cases is, that [85] the law prescribes one uniform condition to such bonds, but discriminates between the liability imposed by a breach of the condition in the different classes of cases. In appeals from a judgment or decree *in personam* the liability extends so far as to secure the judgment or decree; but in appeals from a decree *in rem* the demand asserted in the suit, and to obtain the payment of which the proceeding is instituted, is not secured by the bond. These cases have not settled the doctrine in the manner and to the extent contended for. They only decide that in cases where there is a mere decree of foreclosure, made for the purpose of subjecting real estate to the payment of judgments at law, and an appeal is taken, the bond required by law does not secure the amount of the demand for the payment of which the land is decreed to be sold. This, according to the reasoning of the court in the first case, results in some measure from the nature of the property which is looked to for the security of the debt. It is permanent and not subject to loss, removal or destruction, and, consequently, a stipulation in the



[87] In Maryland, where the appeal has not been prosecuted to effect the rule of damages and the extent of recovery will depend on the loss and injury sustained by reason of the stay

bond for its security is unnecessary, and not contemplated by law. If, however, it be conceded that the same doctrine ought to apply to all decrees merely for the sale of mortgaged property, whether personal or real, it by no means follows that it ought to be extended to that class of cases where personal property is attached by a proceeding in chancery instituted for the purpose of obtaining payment of the complainant's demand, where the debtor has a right to retain the property by executing a bond, especially when the appeal is taken by the debtor himself, having the property in his possession at the time. The effect of the appeal may be to diminish very materially, if not to destroy, the security of the complainant's demand by postponing the execution of the decree until the sureties in the bond executed by the debtor become insolvent, and the property itself be consumed or disposed of, and placed beyond the reach of the creditor.

"In the case of *Worth v. Smith*, 5 B. Mon. 504, it appeared that a number of creditors were proceeding at the same time to subject by attachments the steamer *John Mills* to the payment of their several debts; that the steamer had been sold, and the proceeds of the sale were under the control of the court. In that state of case a contest arose among the creditors about the disposition of the fund; and part of the creditors being dissatisfied with the decree of the chancellor upon the subject appealed to this court, and the decree was affirmed. A suit was then brought by the preferred creditors against the surety in the appeal bond, and it was

held that he was only liable for the costs and damages awarded by this court, and not for the sums decreed to the creditors out of the fund for distribution. The ground of the decision was, that the appeal did not affect the security of the fund; that, notwithstanding the appeal, it remained under the control of the chancellor, who was not thereby restricted from taking any step which he might deem proper to secure it. This case does not, however, settle the principle that an appeal taken by the debtor from a decree to sell personal property which had been attached and remained in his possession would not impose [86] any liability upon the obligors in the appeal bond for the amount of the decree. It seems rather to authorize an opposite inference, inasmuch as in the case last mentioned the appeal would have the effect to suspend the action of the chancellor altogether, and deprive him of all control over the property, and of all power to provide for its security. But let this question be disposed of as it may when it arises, the decree in this case, in our opinion, partakes of the nature of a personal decree, and was virtually, and in effect, a decree against the parties for whom the defendant became surety in the bond, and, consequently, is not within the operation of the principle applicable to the cases where the proceedings are exclusively *in rem*. The statutes under which the proceeding was instituted in the chancery court made the defendants liable to the action of the party aggrieved, either at law or in chancery (1 Statute Law, 260), so that the chancellor had the power to render a personal decree against them

of execution on the judgment appealed from.<sup>1</sup> In an action on the appeal bond the measure of damages is the actual injury suffered by the appellee from the delay in whatever

for the sum adjudged to the complainant. The boat or vessel in which the slaves were removed out of the limits of the commonwealth is also made liable, and may be condemned and sold to pay and satisfy the damage sustained by the complainant and the costs of suit. But the proceeding against the boat is merely ancillary to the main object of the suit, and intended to aid in its accomplishment, by furnishing means to be applied to the satisfaction of the decree. The proceeding was not exclusively *in rem*, but was both *in rem* and *in personam*.

"The damages sustained by the complainant had been ascertained, and a decree rendered for the amount. The defendants had been required to produce the attached property, and had failed to comply with the requisition. The chancellor could have ordered an execution to issue against them immediately for the sum decreed and costs of the suit, or could have enforced the payment of the amount by proceeding against the parties in the bond executed for the forthcoming of the property. In this attitude of the case the parties agreed that the decree pronounced should be treated as a final decree, and the defendants obtained an appeal. The effect of the appeal was to suspend the execution of the decree and prevent the chancellor from ordering an execution to issue against the defendants, or to enforce the bond. The decree, as it was rendered, would not have authorized an execution to issue against the defendants without

an additional order; but still the decree was personal, and imposed upon the defendants the duty to pay the money to which the complainant was entitled, and the enforcement of this duty was prevented by the appeal. There is a clear distinction between this case and the cases that have been referred to. In those cases the defendants were not personally liable, and the chancellor had no power to order an execution to issue upon the decree. In the case of *Worth v. Smith* the appeal was not taken by the debtor, but by part of the creditors whose claims had been postponed, and who, of course, were in no manner responsible for the fund in contest, and against whom no decree had been rendered for the payment of money. And in that case the court said that as the surety might have executed the bond alone without his principal, if he were to be made liable for the fund in contest, which had been decreed to the preferred creditors, his liability would exceed that of his principal, against whom no decree for the payment of the fund or any part of it had been rendered. That reasoning, however, does not apply to this case. Here a decree had been pronounced against the principals of the surety. They were personally liable for the sums decreed. The appeal was evidently taken to prevent the enforcement of that liability. The nature of the proceeding had undergone a radical change. It had become, by the failure to deliver the property attached, exclusively personal. It was no longer *in rem*, for

<sup>1</sup> *Keen v. Whittington*, 40 Md. 489.

manner it arises.<sup>1</sup> If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest is a clear loss to the plaintiff, occasioned by the delay, and should be made the standard in the absence of other injury.<sup>2</sup> By such a bond in a foreclosure case, which is *in rem*, the obligors are not bound on affirmance of the decree to pay the mortgage debt, nor to make good to that extent any deficiency in the proceeds of the sale of the land,<sup>3</sup> nor did they stipulate that the land should sell for enough to pay even the principal of this debt; but if the deficiency was increased by accumulation of interest by the delay of the appeal, or by the intermediate depreciation of the mortgaged property, such increased deficiency would be an item of damage covered by the bond.<sup>4</sup>

§ 535. **Same subject.** Where the operation of an injunction was suspended by an appeal — and it was held that such was the effect of an appeal from an order allowing it — on the affirmance of the order, if the thing on which it was intended [88] to operate should exist in specie in the defendant's possession, then the injunction is restored to its original vigor; but if the thing is consumed or disposed of the complainant must proceed on the bond which was given to indemnify him from all loss and injury which he may sustain by reason of the appeal. And the measure of damages is the value of the property or thing so disposed of and lost to him.<sup>5</sup>

Where a judgment in replevin for the return of the goods is affirmed, their value (if they have not been restored) and the costs of suit would seem to be the true standard by which the damages of the appellee should be measured on a suit

there was no property for the chancellor to act upon. He could have proceeded against the surety in the bond, but his liability was personal. The remedy, however, was not confined to the liability of the surety, but extended to the defendants, who were personally liable for the amount of the decree by the express provisions of the statute, which authorizes the party aggrieved in such a case to sue in chancery."

<sup>1</sup> Wood v. Fulton, 2 Har. & Gill, 71.

<sup>2</sup> Id.; Jenkins v. Hay, 28 Md. 547.

<sup>3</sup> Kennedy v. Nims, 52 Mich. 153.

<sup>4</sup> Hinkle v. Holmes, 85 Ind. 405; Jenkins v. Hay, 28 Md. 547; Cook v. Marsh, 44 Ill. 178; Utica Bank v. Finch, 3 Barb. Ch. 293.

There is an intimation that depreciation in the market value of property is not an element of damage. See Kountze v. Omaha Hotel Co., 107 U. S. 378.

<sup>5</sup> Blondheim v. Moore, 11 Md. 365; Everett v. State, 28 Md. 190.

brought on the appeal bond.<sup>1</sup> In Vermont, where the conditions of the bond are that the appellant will prosecute his appeal to effect, or pay all intervening damages occasioned thereby, in estimating such damages the property which the appellant had at the time of the appeal, and all that he acquired during its pendency, is to be taken into account. The plaintiff is entitled to recover the value of his chance of collecting his debt during the time of the suspension of his execution.<sup>2</sup> A lessee in possession of premises subject to a right of dower is not liable to heirs not in possession for rents and profits pending an appeal from an order appointing commissioners to make partition.<sup>3</sup> Nor is one who appeals from the allowance of a will liable on such a bond, in case of affirmance, for extra expenses of the executors in prosecuting the suit subsequent to the appeal beyond the taxable costs; but where such appeal necessitates the appointment of a special administrator, the extra expenses of special administration, beyond the amount that would have been necessary if the estate had been settled by the executors without the intervention of the appeal, constitutes intervening damages recoverable on the bond.<sup>4</sup> The legislature intended only to provide for the security and recovery of intervening damages whenever the [§9] appellee should have judgment therefor, and not to create any new liability. The appellant is to give security for such damages, provided the other party should be found entitled to recover any.<sup>5</sup> And where interest is recoverable as intervening

<sup>1</sup> *Karthauss v. Owings*, 6 H. & J. 134.

<sup>2</sup> *McGregor v. Balch*, 17 Vt. 562.

<sup>3</sup> *Stockwell v. Sargent*, 37 Vt. 16.

<sup>4</sup> *Sargeant v. Sargeant*, 20 Vt. 297.

By statute passed in Illinois in 1865, it was provided that appeals shall be allowed to the supreme court from all decrees, judgments and orders of inferior courts from which writs of error might be lawfully prosecuted; and in granting appeals inferior courts shall direct the condition of appeal bonds, with reference to the character of the decree, judgment or order appealed from.

A bond was given on appeal from a decree dissolving an injunction which restrained the use of land, conditioned to prosecute the appeal and pay the amount of the judgment, costs, interest and damages rendered and to be rendered in case the decree should be affirmed. No judgment was rendered in either court that the appellee recover the rental value of the real estate; it was therefore held that the obligors were not bound for it. *McWilliams v. Morgan*, 70 Ill. 62.

<sup>5</sup> *Stearns v. Brown*, 1 Pick. 530.



damages it should be moved for and allowed on the hearing of the appeal.<sup>1</sup> If the appellee is entitled only to costs, a bond to pay all intervening costs and damages will secure no more than costs.<sup>2</sup> So in a bond given on appeal, the condition of which was to pay all such costs as the obligee might recover, the costs which accrued before the bond was made, as well as afterwards, are properly included.<sup>3</sup>

A statute of Massachusetts regulating appeals in actions by landlords against tenants provided that if the complainant appeal he shall recognize to pay all intervening damages and costs, and to prosecute his appeal with effect; that if the defendant appeal he shall recognize to pay all rent due and in arrears, and all intervening rent, damages and costs; and that the court of common pleas shall, whenever any appellant thereto shall fail to prosecute his appeal, affirm the former judgment upon the appellee's complaint, and award such additional damages and costs as have arisen in consequence of the appeal. Under these provisions it was contended that it was competent for that court to render judgment in favor of the landlord, when appellee, after defaulting the appellant, for the intervening rent and damages; that "additional damages" include such rent, because he is damaged by being kept out of possession, and include likewise damages for the timber and wood removed, and any injury to the buildings. The court suggest [90] that the case might be likened to that of interest accruing subsequently to the commencement of the action; but reply, that interest is merely incidental, and therefore is brought up to the time of the judgment; that, with the exception of interest, no damages could be recovered except what had accrued before the action was commenced; that the phrase "intervening damages" seems to have been used without any definite meaning; it is the usual language in regard to appeals, and is employed in respect to appeals by the plaintiff where there can be no intervening damages. The court say: "If the tenant keeps out the owner wrongfully, and there

<sup>1</sup> *Stearns v. Brown*, 1 Pick. 530.

<sup>2</sup> *Swan v. Picquet*, 4 Pick. 465.

<sup>3</sup> *Manufacturing Co. v. Barney*, 45 N. H. 40.

lieu of an insufficient one will not operate retroactively unless it is so expressed. *Henrie v. Buck*, 39 Kan. 381.

A second undertaking given in

were no other remedy, the statute might perhaps be so construed as to give this remedy, though it would be an awkward construction. There can, however, be no doubt that an action of debt will lie on the recognizance, and a previous judgment of the common pleas for intervening damages is not necessary to sustain the action. This view is confirmed by the clause in the recognizance to pay rent in arrear. That is not intervening rent, and a remedy for it would necessarily be upon the recognizance.”<sup>1</sup> Under a bond conditioned to pay all “rent due or to become due,” there may be a recovery of rent under a new as well as under the original lease.<sup>2</sup>

**§ 536. Instances of liability on more specific conditions.** The obligations required by later legislation to stay execution pending appeal are generally more precise, specifying the liability with greater particularity. They are usually required, in terms, to secure the payment of money judgments and decrees with the damages and costs which may be awarded on the appeal; and in other cases, likewise, such peculiar damages as result from the appeal according to the nature of the case. What damages and costs may be [91] awarded on appeal will be considered under the next head. The obligation as to the judgment or decree appealed from, as well as to the damages and costs on the appeal, is simply to pay them, or that appellant shall do so, or such part of the judgment or decree below as shall be affirmed. If the bond is general in terms as to the affirmance of the judgment, it will hold the sureties liable for the costs, expenses and losses resulting from an affirmance by the court of last resort.<sup>3</sup> This

<sup>1</sup> *Braman v. Perry*, 12 Pick. 118.

In *Davis v. Alden*, 2 Gray, 309, it is held that a lessee, who, on appealing from the judgment of a justice of the peace or police court in an action on R. S., ch. 104, recognizes, pursuant to statutes of 1848, ch. 142, to pay all intervening rent, and all damages and loss which the lessor may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done to the premises during such withholding, is liable *prima facie*,

and in ordinary cases, to payment at the rate reserved in the lease until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses, including the destruction of the building, if not proved to have been caused by inevitable accident.

<sup>2</sup> *Pray v. Wasdell*, 146 Mass. 324.

<sup>3</sup> *Mackellar v. Farrell*, 57 N. Y. Super. Ct. 398; *Robinson v. Plimpton*, 25 N. Y. 484; *Bennett v. Brown*,

rule has been applied where a new court of final resort was provided for after the bond was executed.<sup>1</sup> When the condition is to pay on the affirmance of the judgment by a designated court, there is no liability for the costs of an appeal from its judgment of affirmance.<sup>2</sup> If, however, the appeal in the first instance is to an intermediate court and the judgment is there reversed, and on an appeal to the court of last resort the judgment of reversal is reversed and the original judgment is affirmed, the sureties will be liable for the costs of the final appeal if the mandate of the appellate court is sent to the intermediate court with directions to enter judgment there in accordance with it; but it is otherwise if such mandate is sent directly to the court of original jurisdiction.<sup>3</sup> If a second appeal removing the case to a higher court, with another set of sureties, results in a second affirmance, the liability of the first sureties is not thereby increased; they are not liable for the costs and damages on the second appeal; nor are the two sets of sureties co-sureties.<sup>4</sup> The undertaking was

20 id. 99; *Gardner v. Barney*, 24 How. Pr. 467; *Smith v. Crouse*, 24 Barb. 433.

<sup>1</sup> *Horner v. Lyman*, 2 Abb. App. Dec. 399; S. C., 4 Keyes, 237.

<sup>2</sup> *Winston v. Rives*, 4 Stew. & Port. 269; *Morgan Co. v. Selman*, 6 Ga. 440; *Nofsinger v. Hartnett*, 84 Mo. 549; *Hinckley v. Kreitz*, 58 N. Y. 583.

<sup>3</sup> *Nofsinger v. Hartnett*, 84 Mo. 459; *Robinson v. Plimpton*, 25 N. Y. 484; *Richardson v. Kropf*, 47 How. Pr. 286; affirmed, 60 N. Y. 634; *Gardner v. Barney*, 24 How. Pr. 467.

<sup>4</sup> *Moore v. Lassiter*, 16 Lea (Tenn.), 636; *Hinckley v. Kreitz*, 58 N. Y. 583. See *Post v. Doremus*, 60 id. 371; *Burdett v. Lowe*, 85 id. 241; *Shankland v. Hamilton*, 1 Thomp. & C. 239; *Smith v. Crouse*, 24 Barb. 433; *Helbner v. Townsend*, 8 Abb. 234.

A defendant in a federal circuit court gave bond with a surety conditioned to keep and perform the final decree in the cause and pay

all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the supreme court of the United States, and gave bond, with a different surety, to pay all such costs as the court should decree to be paid to the plaintiff upon affirmance of the decree of the circuit court. The supreme court affirmed that decree, with costs and interest; and, pursuant to its mandate, the circuit court decreed that its own former decree be affirmed, with costs and interest, and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of costs decreed by the supreme court, and the costs taxed in the circuit court upon the return of the mandate. Held, that this was the final decree in the cause within the meaning of the first bond. *Jordan v. Agawam W. Co.*, 106 Mass. 571.

for the payment of any deficiency which should remain after a sale of the mortgaged premises. On appeal to the general term of the supreme court the judgment was affirmed. An appeal was then taken to the court of appeals, and proceedings were stayed upon an undertaking. It was held that the sureties on the first undertaking had no such right to have the real estate sold under the judgment of foreclosure and their precise liability determined immediately after the affirmance of the judgment as to be released from their obligation by the second undertaking. The order providing for the latter and for the stay of proceedings was not such a novation and substitution of the new undertaking in the place of the original as to release the sureties on the latter from liability for a larger deficiency than would have existed but for the second appeal.<sup>1</sup> The recovery for which the sureties are liable must be in the identical case in which the bond was given. The opposite party cannot make a judgment in his favor obtained in another court, or in another suit, though on the same debt or demand, the measure of their liability.<sup>2</sup>

A surety on an appeal bond is only liable, like other sureties, on the express terms of his contract.<sup>3</sup> Where the under- [92] taking is to pay the amount of the judgment and all damages which shall be awarded on the appeal if the judgment be affirmed, and the order of affirmance is interlocutory and conditional, providing for a new trial in a certain event, the undertaking does not extend to the judgment on such new trial. The final judgment thus obtained is not an affirmance of the first judgment. The sureties were only bound for the first judgment when affirmed.<sup>4</sup> A statute imposing liability for any judgment which may be entered upon the appeal for costs means only such costs as are incurred after the appeal is taken.<sup>5</sup> A bond conditioned to prosecute the appeal with

<sup>1</sup> Mackellar v. Farrell, 57 N. Y. Super. Ct. 398.

<sup>2</sup> Planters' & Miners' Bank v. Hudgins, 84 Ga. 108.

<sup>3</sup> Smith v. Huesman, 30 Ohio St. 662; Lang v. Pike, 27 id. 498; Hall v. Williamson, 9 id. 23; Myers v. Parker, 6 id. 501; Hamilton v. Jefferson, 13 Ohio, 421; Fullerton v. Miller, 22 Md. 1; Rice v. Rice, 13 Ind.

562; Foster v. Epps, 27 Ill. App. 235; Henrie v. Buck, 39 Kan. 381; Nofsinger v. Hartnett, 84 Mo. 549.

<sup>4</sup> Poppenshausen v. Seeley, 3 Keyes, 150; Wilson v. Churchman, 6 La. Ann. 468; Smith v. Huesman, 30 Ohio St. 662.

<sup>5</sup> Robinson v. Masterson, 139 Mass. 560.



effect or to pay, satisfy and abide by the judgment that may be rendered does not impose liability for costs of the trial court.<sup>1</sup> The bond given on an appeal from an order denying a new trial does not cover the judgment subsequently rendered on the verdict unless the benefit of it was lost in consequence of the appeal.<sup>2</sup>

The code has adapted the security on appeal for consequential damages, where a stay of execution is desired, to the special exigence of particular cases. An appeal of itself does not operate to stay proceedings. In an action for specific performance brought by a vendor against the vendee, a judgment was recovered establishing the amount due on the contract, adjudging that the defendant should be barred and foreclosed of all right, claim, etc., to the land, and directing a sale thereof by the sheriff and payment out of the proceeds of the amount adjudged to be due, and in which there was no provision for the payment of any deficiency. The defendant appealed and gave an undertaking according to section 335 of the New York code instead of section 338; it recited that a judgment had been recovered against the defendants. The judgment was affirmed, but no damages were awarded upon the appeal, and the costs were paid. An action was brought on the undertaking, and it was held that though it was not in the proper form, yet as it secured the end for which it was given and stayed all proceedings on the judgment, it was valid as against the defendants who subscribed it; that as no amount was directed to be paid by the judgment, the defendants were only liable for the difference between the amount bid for the land at the time of the sale and the amount which would have been bid at the time at which the judgment directed it to be sold, with interest on such amount to the time of the actual sale; but as no difference was proved none could be presumed, and the plaintiff was only entitled to nominal damages.<sup>3</sup>

It may be doubted that the damages held to be recoverable, [94] if they had been proven, were within the contract.<sup>4</sup> But there being a recital of a judgment against the appellant, were

<sup>1</sup> *Denton v. Wood's Adm'r*, 11 Lea (Tenn.), 505; *Dawson v. Holt*, 12 id.

<sup>3</sup> *Chamberlain v. Applegate*, 2 Hun,

27.

<sup>4</sup> See *McWilliams v. Morgan*, 70 Ill.

<sup>2</sup> *Reitan v. Goebel*, 35 Minn. 384.

62.

not the sureties estopped from denying it? The case is briefly reported, and does not disclose whether the recital stated the amount. In a case in Illinois the action was brought on an appeal bond conditioned to prosecute the appeal to effect, and pay the amount of the judgment, costs, interest and damages rendered and to be rendered against the appellant in case the decree should be affirmed. Scott, C. J., remarking upon a similar point, observed: "It is urged by the defendants that the decree was *in rem*, and was not to be performed by Bischoff; and as the master in chancery has executed the decree by selling the property as directed, he and his surety are discharged from all liability created by the condition of the appeal bond. This is not, in our opinion, the true construction. The bond as set out in the declaration distinctly states a decree had been rendered against Bischoff, from which he had prayed an appeal. The object he had in view was to have the execution of the decree suspended until the cause could be reviewed in the supreme court, and the bond is expressly conditioned for the payment of the judgment in the event the decree should be affirmed. The defendants are estopped by the recitals in the bond to deny what they solemnly admitted to be true, viz.: the existence of a decree against Bischoff; and the legal effect of the engagement is to pay it in case it shall be affirmed on appeal, or be liable for the penalty of the bond."<sup>1</sup>

§ 537. **Same subject.** A statute of Indiana provides that "when any appeal is taken to the supreme court from a judgment in waste, or for the recovery of land, or the possession thereof, the condition of the appeal bond, in addition to the matters hereinbefore prescribed, shall further provide that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the *mesne* profits of the premises recovered, or for any waste committed thereon as well before as during the pendency of such appeal."<sup>2</sup> It was first held that a bond which did not contain a provision in substance [95]

<sup>1</sup>George v. Bischoff, 68 Ill. 236; Meserve v. Clark, 115 id. 580; Guttner v. Kilpatrick, 14 Neb. 347; Love v. Rockwell, 1 Wis. 382; Adams v. Thompson, 18 Neb. 541. If no judg-

ment was rendered in the trial court the bond is a nullity. Brounty v. Daniels, 23 Neb. 162. See First Nat. Bank v. Rogers, 13 Minn. 407.

<sup>2</sup>R. S. 1843, p. 633.

like the statute, although it was conditioned for the prosecution of the appeal, and there had been a breach of that condition, did not render the sureties liable for the rents and profits.<sup>1</sup> But the late cases hold that such liability exists by virtue of the statute, although the bond is silent.<sup>2</sup> In an action for unlawful detainer a judgment was rendered for the plaintiff below, and the bond on appeal was conditioned "to pay all costs of such appeal, and abide by the order the court may make therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of the appeal." The plaintiff sought to recover on the bond treble damages for which the defendant was liable, but it was held that the responsibility was limited by the terms of the bond, and the treble damages claimed were not covered by the phrase "other damages justly accruing," but only actual damages;<sup>3</sup> which are the value of the use and occupation or the reasonable rental value of the premises.<sup>4</sup> The rental value of the premises during the pendency of a writ of error in an action of ejectment, the money judgment being merely nominal, cannot be recovered upon a bond conditioned for the prosecution of the writ to effect and the payment of the debt, damages and costs adjudged or accrued upon such judgment, and all other damages or costs that may be awarded.<sup>5</sup> The sureties upon an appeal and *supersedeas* bond from a decree enforcing judgment liens on land are not responsible after the affirmance of the decree for any portion of the rents and profits of the land while the cause was pending on appeal, or for any loss sustained by the appellees on account of the debtor's receipt thereof.<sup>6</sup> In Alabama an appeal bond which stays the execution of a judgment for the recovery of land or its possession, if conditioned for the payment of "all costs and such damages

<sup>1</sup> Malone v. McClain, 3 Ind. 532.

<sup>2</sup> Opp v. Ten Eyck, 99 Ind. 345;  
Hays v. Wilstach, 101 id. 100.

<sup>3</sup> Chase v. Dearborn, 23 Wis. 143.

The case of Post v. Doremus, 1 Hun, 521, has some curious features, and is an example of liberal construction of the contract of the sureties to effectuate their obvious intention. It was substantially modified on appeal.

Post v. Doremus, 60 N. Y. 371. See Reed v. Lander, 5 Bush, 598; Whitehead v. Boorum, 7 id. 399; Wade v. First Nat. Bank, 11 id. 697.

<sup>4</sup> Shunick v. Thompson, 25 Ill. App. 619.

<sup>5</sup> Johnson v. Hessel, 134 Pa. St. 315.

<sup>6</sup> Hutton v. Lockridge, 27 W. Va. 428.

as the plaintiff may sustain by reason of this appeal," covers the loss of the possession and the value of the use.<sup>1</sup> If an appeal is taken from a decree distributing a fund in court, proceedings being stayed, interest may be recovered on so much of it as was detained therein, and also a reasonable attorney's fee for services in the appellate court.<sup>2</sup>

The condition of a bond was to prosecute the appeal [96] with effect and satisfy and pay, in case of affirmance, the damages, charges and costs decreed below, and also all costs and damages that should be awarded by the appellate court. The appeal was from an order dissolving an injunction, thereby continuing it in force, restraining the collection or negotiation of certain drafts. In an action on this bond, after affirm- [97] ance of the order, the plaintiff sought to recover the value of those drafts which were lost by reason of the delay caused by the appeal, notwithstanding such damages were not decreed in the case in which the appeal was taken. But the court held that the liability of a surety could not be extended by implication beyond the terms of his contract; and that the damages proposed to be recovered were not within the bond.<sup>3</sup> The bond does not impose liability upon the sureties for the act or neglect of any person who is not restrained by it.<sup>4</sup> A bond to secure costs is limited to plaintiff's costs.<sup>5</sup> Where the appeal bond is for costs and damages only, the sureties are not liable for the debt.<sup>6</sup> Damages within the prescribed terms of

<sup>1</sup> Cahall v. Citizens' Mut. Building Ass'n, 74 Ala. 539.

<sup>2</sup> Drake v. Webb, 63 Ala. 596.

<sup>3</sup> Fullerton v. Miller, 22 Md. 1.

<sup>4</sup> Roberts v. Jenkins, 80 Ky. 666.

<sup>5</sup> Hiett v. Davis, 88 Ind. 372.

<sup>6</sup> Smith v. Erwin, 5 Yerg. 296; Banks v. Brown, 4 id. 198; Gholson v. Brown, id. 496; Onderdonk v. Emmons, 9 Abb. 187.

Stille v. Beauchamp, 13 La. Ann. 474: Where the appeal bond recites the judgment and sets forth the fact that the appellant has taken a suspensive appeal from such judgment, and a blank is left for the amount to be filled up, it will be presumed that

it was left in order to ascertain by calculation the amount fixed by law for the suspensive appeal, and the party signing the bond will be bound for that amount.

Ward v. Bell, 18 Ind. 104: If the instrument given specifies no amount or contains no penalty the law will hold the obligors in it liable to the extent required by the statute, upon an appeal and *supersedeas* in such cases, on the ground of the intention of the parties executing the instrument to become liable to that extent. But sureties may expressly limit the amount of their liability by the terms of the obligation; and if they do, and



[98] an appeal bond or undertaking may be disallowed when they exceed the rights of the party claiming, and the legal liability imposed on the other; as where a general form of undertaking is required for a class of cases usually similar, but distinguishable by individual differences, and the liability contended for does not exist in the particular case. Thus, in an action

the officer is satisfied with it and accepts it, they will not be bound beyond the amount named, but if the bond proves insufficient the officer may be liable for the deficiency.

Reeves v. Andrews, 7 Ind. 207: A. sued B. before a justice; B. pleaded a set-off and recovered a judgment. A. appealed and executed a bond after the statute, but in the court above dismissed the action. B. thereupon sued him and his surety upon the appeal bond. Held, that he had a right to dismiss; that the dismissal operated to avoid the proceedings before the justice; that the obligors were estopped at this stage to deny that the appeal had been taken, and that the dismissal was a breach of the condition of the bond, but that the obligor was entitled to only nominal damages, unless special damages were alleged and proved.

Raney v. Baron, 1 Fla. 327: An appeal bond was conditioned that A. should pay said damages so recovered by said B. against him, and costs, in case the judgment of the said court should be confirmed. Held, that the surety in the bond was not liable for the ten per cent. damages awarded by the appellate court against the appellant, but only for the judgment and costs in the court below.

A bond which operates as a *superseedeas*, and conditioned "to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed," covers as well the costs decreed and taxed to the appellee in the court below as to those in the ap-

pellate court. *Daly v. Litchfield*, 11 Mich. 497; *Prosser v. Whitney*, 46 id. 407.

By the Tennessee code, section 3162, in actions founded upon liquidated accounts signed by the party to be charged therewith, bonds, bills single, etc., upon an appeal in the nature of a writ of error, the bond shall be taken and the securities bound for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court where the cause may be finally tried. *Patrick v. Nelson*, 2 Head, 507.

Under a statute which provides that if any appeal shall be dismissed the surety shall be liable for the whole amount of the debt, costs and damages recovered against the appellant, the debt and damages meant are such as were recovered in the trial court, no judgment therefor being rendered in the appellate court. *Fitzgerald v. Wellington*, 37 Kan. 460.

If the bond is for the payment of the judgment and interest it is a mere security for the payment of the former, and whatever discharges the judgment releases the obligors. Hence, if the appeal is dismissed without an assessment of damages and the costs thereof paid and the judgment reversed in another proceeding, there is no liability for anything beyond nominal damages, although an action on the bond was begun before such reversal. *Cook v. King*, 7 Ill. App. 549.

upon an undertaking executed by the defendant in a foreclosure case upon appeal, pursuant to the California practice act,<sup>1</sup> it was considered by the court that the legislature could not have intended by that section to increase the liability of the principal debtor. It was therefore held that the provision in regard to use and occupation should be understood as referring to those cases in which the creditor is entitled to the value of the use; and that an undertaking to pay what the creditor has no legal right to is not binding on the sureties; that as this section includes orders as well as judgments, the provision in question applies more particularly to judgments and orders directing a delivery of possession.<sup>2</sup> If all of several plaintiffs or defendants appeal and execute a joint bond, as they ought, each is answerable for the entire amount. If one alone execute, he is bound for the whole.<sup>3</sup> If a bond is given on an appeal from a joint judgment against all the appellants and on behalf of all of them, the sureties are liable on its reversal as to all but one of their principals, it being affirmed as to him.<sup>4</sup> A judgment is affirmed within the meaning of an appeal bond though a finding be eliminated from the record.<sup>5</sup> But in a California case, the decision being influenced somewhat by the provisions of the code, it was held that the affirmance must be *in toto* to make the sureties liable.<sup>6</sup>

<sup>1</sup>The section referred to corresponds with section 338 of the New York code: "If the judgment appealed from directs the sale or delivery of possession of real property the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit, nor suffer to be committed, any waste thereon; and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment, not exceeding a sum to be fixed by the judgment of the court by which

the judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

<sup>2</sup>Whitney v. Allen, 21 Cal. 233.

<sup>3</sup>Young v. Young, 2 J. J. Marsh. 72; Brown v. Hancock, 13 Tex. 21.

<sup>4</sup>Gilpin v. Hord, 85 Ky. 213; Ives v. Hulce, 17 Ill. App. 35; Alber v. Froehlich, 39 Ohio St. 245, overruling Lang v. Pike, 27 id. 498; Lutt v. Sterrett, 26 Kan. 561.

<sup>5</sup>Foster v. Epps, 27 Ill. App. 235.

<sup>6</sup>Heinlen v. Beans, 71 Cal. 295. See Chase v. Ries, 10 id. 517.

The designated amount is the limit of the liability of the sureties,<sup>1</sup> except where interest is allowed as damages for delay in paying.<sup>2</sup>

§ 538. **Interest and damages awarded on appeal.** By section 23 of the judiciary act it is provided that where the supreme court shall affirm the judgment or decree they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. There [99] are similar statutes in the states, but there is generally a limitation to a certain per cent. In the federal courts the rate and limit were fixed by rule in 1803 and 1807 at ten per cent. per annum on the amount of the judgment to the date of affirmance where the suit was for mere delay, and six per cent. where there was a real controversy. In both cases the interest was computed as part of the damages, and had to be specially allowed. If, upon the affirmance, no allowance of interest or damages was made, it was equivalent to a denial thereof, and the circuit court in carrying into effect the decree of affirmance could not enlarge the amount thereby decreed, but was limited to the mere execution of the decree in the terms in which it was expressed.<sup>3</sup> There was no interest or damages after the date of affirmance, unless so allowed, until 1842, when it was provided by act of congress, "that on all judgments in civil cases hereafter recovered in the circuit or district courts of the United States interest shall be allowed and may be levied by the marshal, under process of execution issued thereon, in all cases where by the law of the state in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state."<sup>4</sup>

In 1852 the supreme court, by rule 62, still further extended the provision for interest, and both interest and damages are now regulated by rule 23, which declares: 1. The interest is

<sup>1</sup> *Graeter v. De Wolf*, 112 Ind. 1;  
*Zeigler v. Henry*, 77 Mich. 480.

<sup>3</sup> *Boyce v. Grundy*, 9 Pet. 275;  
*Perkins v. Fourniquet*, 14 How. 313.

<sup>2</sup> *Crane v. Andrews*, 10 Colo. 265;  
§§ 477, 478, *ante*.

<sup>4</sup> 45 Stats. at Large, 508.

to be calculated and levied from the date of the judgment below until the same is paid, at the same rate as interest on judgments in the state courts. 2. That where a writ of error delays the proceedings on a judgment, and appears to be sued out for delay, ten per cent. in addition to the interest is to be allowed upon the amount of the judgment. 3. The same rule is to be applied to the decrees for the payment of money in cases in chancery, unless otherwise ordered by the court. This third clause is intended doubtless to adopt for chancery cases the "same rule" as to interest only. The second clause [100] can only be applied by an affirmative finding that the proceeding has been taken for delay, and hence is not a rule which could take effect unless otherwise ordered. The court, however, under section 23 of the judiciary act, has authority to award just damages and single or double costs, at its discretion, as well in equity as in law cases. In admiralty a different rule as to interest or damages prevails. In such cases there is a discretionary power to add to the damages allowed in the court below further damages by way of interest. But this allowance of interest is not an incident of affirmance affixed to it by law or by rule of court. If given by the court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.<sup>1</sup> No damages will be allowed on appeals and writs of error except on money judgments or decrees.<sup>2</sup> They are allowed for delaying the plaintiff where delay is the object and there is no ground or expectation of reversal in whole or in part.<sup>3</sup>

<sup>1</sup> Hemmenway v. Fisher, 20 How. (U. S.) 255; Phillips' Practice, 191.

<sup>2</sup> Arrowsmith v. Rappelge, 19 La. Ann. 327; Long v. Robinson, 13 id. 465; Hodges v. Holeman, 5 Dana, 136.

<sup>3</sup> Cotton v. Wallace, 3 Dall. 302; Barrow v. Hill, 13 How. (U. S.) 54; Lathrop v. Judson, 19 id. 66; Kilbourne v. State Institution, 22 id. 503; Sutton v. Bancroft, id. 320; Jenkins v. Banning, id. 455; Prentice v. Pickersgill, 6 Wall. 511; Campbell v. Wilcox, 10 id. 421; Warner v. Lessler, 33 N. Y. 296; Maher v. Car-

man, 38 id. 25; Winfield v. Potter, id. 67; Murray v. Mumford, 2 Cow. 400; Lehane v. Keyes, 2 Nev. 361; Ramsay v. Davis, 20 Wis. 31; Russell v. Williams, 2 Cal. 158; Magruder v. Melvin, 12 Cal. 559; Cady v. Scanner, 1 Idaho, 198; Whittlesey v. Sullivan, 33 Mo. 405; Owings v. McBride, 32 id. 221; Robinson v. Starley, 29 Ind. 298; Hutchinson v. Ryan, 11 Cal. 142; Wright v. Sanders, 3 Keyes, 323; Amory v. Amory, 91 U. S. 356; Dzialgnski v. Bank, 23 Fla. 346.



§ 539. **Same subject.** The court will not award damages unless the proceeding is in this sense taken in bad faith.<sup>1</sup> They have been allowed for the reason that all the questions raised have been previously settled by the court of last resort, or are decided by reference to plain elementary principles;<sup>2</sup> and also where there is no bill of exceptions or statement of [101] facts, and no error is suggested or apparent in the record;<sup>3</sup> and in some states for default in filing transcript;<sup>4</sup> in not taking other necessary steps;<sup>5</sup> or on abandonment of the appeal.<sup>6</sup> But in Georgia the mere fact that the appellant did not submit evidence to support his defense, or failed to prosecute his appeal, does not show that it was frivolous so as to subject him to damages.<sup>7</sup> The same appears to be the rule in Vermont.<sup>8</sup> And if there is error in the judgment the court will not award damages, even though the error is so small that they refuse to disturb the judgment.<sup>9</sup> Nor will they allow damages where the appeal proves unsuccessful by a change in the law, as by the emancipation of slaves.<sup>10</sup> Where the court below erroneously excluded evidence necessary for the recovery of double damages and the verdict and judgment were given for single damages,<sup>11</sup> where the appellants are not themselves indebted to the appellees, and no decree for money has been rendered against them;<sup>12</sup> or where the decision involves questions of fact and the evidence is conflicting,<sup>13</sup> damages for a frivolous appeal will not be allowed. Nor will they

<sup>1</sup> *Story v. Bird*, 8 Mich. 316; *Hart-ridge v. McDaniel*, 20 Ga. 398; *North-western L. Ins. Co. v. Starkweather*, 38 Wis. 361; *Morse v. Buffalo Ins. Co.*, 30 Wis. 534; *Tobin v. Missouri P. Ry. Co. (Mo.)*, 18 S. W. Rep. 996.

<sup>2</sup> *Pinkham v. Wemple*, 12 Cal. 449.

<sup>3</sup> *Chambers v. Hodges*, 3 Tex. 517; *Whittlesey v. Sullivan*, 33 Mo. 405; *Owings v. McBride*, 32 Mo. 221.

<sup>4</sup> *Anonymous*, 11 Ill. 87.

<sup>5</sup> *Stafford v. Anders*, 10 Fla. 211; *Hall v. Kennedy*, *Sneed (Ky.)*, 124.

<sup>6</sup> *Hohl v. Meyer*, 7 La. Ann. 18.

<sup>7</sup> *Gilmore v. Wright*, 20 Ga. 198; *Hull v. Tommy*, 30 Ga. 762. See *Madison, etc. R. Co. v. Briscoe*, 18 B. Mon. 570.

The advice of counsel will not relieve the appellant from damages if there is no semblance of merit in the appeal. *Cauthen v. Barnesville Bank*, 68 Ga. 287.

<sup>8</sup> *Pearse v. Goddard*, 1 Tyler, 373.

<sup>9</sup> *Simons v. Burrows*, 6 La. Ann. 352.

<sup>10</sup> *Henderson v. Montgomery*, 18 La. Ann. 211.

<sup>11</sup> *Waddell v. Chicago, etc. R. Co.*, 20 Iowa, 9.

<sup>12</sup> *Rowan v. Pope*, 14 B. Mon. 102. See *Northwestern L. Ins. Co. v. Irish*, 38 Wis. 361.

<sup>13</sup> *Austin v. Moore*, 16 La. Ann. 218.

be awarded to a respondent upon affirmance of a judgment fully paid and satisfied before the taking of the appeal. This rule was applied to a case where the plaintiff in a foreclosure decree purchased the property at the sale for the full amount of the debt, including costs and interest, and the sale had been confirmed before the appeal. It was considered that the statute providing for damages on affirmance did not reach such a case, or, at least, was quite inoperative, for there could be no delay of payment to complain of arising from the [102] appeal.<sup>1</sup> And part payment of the judgment below will relieve from damages *pro tanto*.<sup>2</sup> So, where a *supersedeas* bond is executed, but a *supersedeas*, though necessary to stay proceedings, is not actually issued, no damages will be allowed.<sup>3</sup> In Oregon damages are not allowed except where there has been an abandonment of the appeal.<sup>4</sup>

<sup>1</sup> Northwestern L. Ins. Co. v. Irish, Whitehead v. Boorum, 7 id. 399; 38 Wis. 361. Wade v. First Nat. Bank, 11 id. 697.

<sup>2</sup> Brady v. Holderman, 19 Ohio, 26.

<sup>4</sup> Nelson v. Oregon Ry. & N. Co., 13

<sup>3</sup> Reed v. Lander, 5 Bush, 598; Ore. 141.

## CHAPTER XII.

## NOTES AND BILLS.

## § 540. Promissory notes and bills of exchange.

541. Principal sum.

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544-548. Partial failure of consideration.

549, 550. Consideration fraudulent or illegal in part.

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555. Liability of drawer and indorser for principal sum.

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558. Liability of drawer or indorser for interest as damages.

559. Notes and bills are by definition payable only in money.

560, 561. Re-exchange and damages on bills dishonored.

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565. Value of notes and bills.

[103] § 540. **Promissory notes and bills of exchange.** The liability of parties to these instruments varies according to their relations to them. There is an essential difference in their contracts, and these are subject to different laws. Each party must pay such damages as result naturally and proximately from a breach of his particular contract as interpreted by law. The *maker of a note* enters into an express agreement absolutely to pay a sum certain, either presently or at a specified time in the future, to a person named, or to his order, or the bearer. When notes are drawn according to the usual forms their requirements are plain to the common understanding. These forms are, however, sometimes departed from, and not being precise in language, the short and indeterminate expressions used require interpretation. The liability of an *acceptor of a bill of exchange* is similar to that of the maker of a note. His agreement is to comply with the request contained in the bill. An absolute acceptance is an engagement to pay according to the tenor of the bill, and a conditional or partial one obliges him to pay according to the tenor of the

acceptance.<sup>1</sup> He is primarily and originally liable to pay the bill, but this liability originates in the acceptance, and he is under such obligation only as attaches thereby.<sup>2</sup>

The measure of damages for non-performance of an [104] agreement to accept for the drawer's accommodation a draft which is still in his hands is the loss and inconvenience thereby occasioned to him, and not the amount of the draft.<sup>3</sup> One who draws without authority cannot recover as damages the sum he is compelled to pay in consequence of the draft being returned protested.<sup>4</sup> A contract results from an acceptance as absolute and certain as from making a note. The amount payable at maturity by the acceptor or maker is ascertained from the face of the paper by similar rules.<sup>5</sup> After default the sum recoverable by the holder is also determinable against both by like rules; but the acceptor stands in a peculiar relation to the drawer, and the drawer to indorsers, as do also the indorsers of a bill to each other, in respect to re-exchange, or damages in lieu thereof. These peculiarities will receive attention in the proper connection. The sum recoverable from the several parties includes principal and interest, together with the notarial fees where a protest is necessary or authorized to fix the liability of secondary parties,<sup>6</sup> and sometimes exchange and re-exchange.

§ 541. **Principal sum.** A note or bill is by definition made for a *sum certain* payable in money. Hence, if it is valid, and subject to be enforced according to its terms, that precise sum as principal is to be recovered. Where the party sued is liable for the full amount the person having the legal title may recover it, though some other person is entitled to the

<sup>1</sup> Thomas v. Thomas, 7 Wis. 476; Chitty on Bills, 303; Story on Bills, § 238; 1 Par. on Cont. 281.

<sup>2</sup> Chitty on Bills, 304; Anderson v. Anderson, 4 Dana, 352.

<sup>3</sup> Ilsley v. Jones, 12 Gray, 260.

<sup>4</sup> Rouvert v. Patton, 12 S. & R. 253.

<sup>5</sup> Story on Prom. Notes, § 114.

<sup>6</sup> Doughty v. Hildt, 1 McLean, 334; City Bank v. Cutter, 3 Pick. 414; Noyes v. White, 9 Kan. 640; Knowles v. Armstrong, 15 Kan. 371; Ticknor v. Branch Bank, 3 Ala. 135; Curtis v.

Buckley, 14 Kan. 449; Woolley v. Van Volkenburgh, 16 Kan. 20; Loud v. Merrill, 47 Me. 351; Weldon v. Buck, 4 Johns. 144; Bowen v. Stoddard, 10 Met. 375; Cook v. Clark, 4 E. D. Smith, 213; Merritt v. Benton, 10 Wend. 116.

If it is necessary or more convenient for the indorsee to send notice to the indorser by special messenger, he may do so and recover the expense. Pearson v. Crallan, 2 Smith, 404 (1805).



proceeds; if the suit be brought with his consent and for his benefit, as where the plaintiff is an agent for collection, although the beneficial interest of such plaintiff extends only to a part of the amount due. The surplus would in such case be [105] held by him as trustee for any other party entitled to receive it. Thus, if a bill be drawn in the regular course of business, as for money really due from the drawee to the drawer, in order to avoid several actions, an indorsee, though he has not given the full value of it, may recover the whole sum payable, and will hold the overplus as trustee for the in- [106] dorser.<sup>1</sup> And if the holder receive part payment of the

<sup>1</sup> Chitty on Bills, \*677.

The interest of the acceptor is not liable to be affected by the state of accounts, or equities, between the other parties connected with the bill; and the only question in which he has any interest is, whether the party seeking to enforce payment by him is the legal owner of the bill, and whether recovery by and payment to such party will be a satisfaction and absolute discharge of his liability upon the bill. *Jones v. Broadhurst*, 9 M., G. & S. 173 (67 Eng. C. L.), per Cresswell. But *Wilde, C. J.*, said: "Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill."

This case was very thoroughly argued and carefully considered upon principle and authority. And it was held that a bill accepted for value

may be collected by the holder in an action against the acceptor, notwithstanding it has been paid to such holder by the drawer; it not appearing that such payment was made in behalf of the acceptor. It affirms the right of the holder to recover for the use of the party paying him, citing *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 1 M. & P. 11 (17 Eng. C. L.); S. C., 4 Bing. 390; 3 C. & P. 134; *Reid v. Furnival*, 1 Cr. & M. 533; *Ex parte De Tastet*, 1 Rose, 10. But if the acceptor has a defense which would be good against the bill in the hands of the party who has paid it to the plaintiff, he may use that as an equitable defense to the extent that the action is prosecuted for the use of that party. *Thornton v. Maynard*, L. R. 10 C. P. 695. To a declaration by the holder against the acceptor of several bills of exchange, the defendant pleaded by way of equitable defense that the drawers became bankrupt, and that the plaintiff received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers. Held, a good equitable defense *pro tanto*. *Agra v. Leighton*, L. R. 2 Exch. 56; *Cochrane v. Green*, 9

first indorser he may, nevertheless, recover the whole against the drawer and acceptor; though if the latter pay a part then only the residue can be recovered against the former.<sup>1</sup>

The rule permitting the holder of a bill or note to recover more than is due to himself is limited to cases where there is some other person entitled to receive from the defendant the overplus of what is due the plaintiff; and, if there be no such person, the plaintiff will be permitted only to recover what is due himself.<sup>2</sup> But in case of bankruptcy, though the holder may prove the whole amount under a commission against a remote party, and receive a dividend until his debt is satisfied, he cannot prove for more than the sum actually due on the balance of account against his immediate indorser.<sup>3</sup>

In cases where there is a defense to a note or bill, in whole or in part, it is unavailable, and the sum payable according to its face is recoverable if the paper has passed into or through the hands of a *bona fide* holder by successive transfers. The title of an indorsee is the title of all the prior parties.<sup>4</sup> As soon as it comes into the hands of a holder, as to whom it is

C. B. (N. S.) 448; *Elkin v. Baker*, 11 id. 526; *Clark v. Cort*, Cr. & Ph. 154. Lord Coleridge, C. J., said: "These cases . . . appear to establish the soundness of these two propositions: 1. That the holder, having been paid a part of the bill by the drawer's trustees, sues as regards that sum as trustee for the benefit of the drawer's trustee; and 2. That where the plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which but for the intervention of the trust could have been a set-off at law, such claim can be set off in equity. If, then, these two propositions are sound—and we think they are,—it follows that the plea is good, unless the bankruptcy makes a difference. We think it does not." *Belohradsky v. Kuhn*, 69 Ill. 547; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304.

*St. Quintin*, 1 B. & P. 658; *Johnson v. Kennion*, 2 Wils. 262; *Ex parte De Tastet*, 1 Rose, 10.

<sup>2</sup> *Chitty on Bills*, \*677; *Pierson v. Dunlop*, 2 Cowp. 571; *Steel v. Bradfield*, 4 Taunt. 227; *Jones v. Hibbert*, 2 Stark. 304.

A note for a definite sum, given as security for advances, can only be enforced as between the original parties, to the extent of the advances made. *Vogan v. Caminetti*, 65 Cal. 438; *Rogers v. Smith*, 47 N. Y. 324.

<sup>3</sup> *Ex parte Bloxham*, 6 Ves. 448, 600; *Ex parte Leers*, id. 644; *Chitty on Bills*, \*678.

<sup>4</sup> *Edwards v. Jones*, 2 M. & W. 414; *Hunter v. Wilson*, 4 Exch. 489; *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 10; *Robinson v. Reynolds*, 2 Q. B. 202, 210; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *United States v. Bank of Metropolis*, 15 Pet. 393.

<sup>1</sup> *Chitty on Bills*, \*677; *Walwyn v.*

not subject to defenses and equities good between antecedent parties, its character as a negotiable security is established, and he can transfer it with that immunity.<sup>1</sup> But if the holder [107] has paid less than full value for the paper, his privilege as *bona fide* holder to exclude defenses attaches, according to some authorities, only in respect to the amount he has paid. As to the remainder there is no privilege; it is open to defenses.<sup>2</sup> Mr. Daniel says that "where some legal con-

<sup>1</sup> Hascall v. Whitmore, 19 Me. 102; Thomas v. Newton, 2 C. & P. 606; Smith v. Hiscock, 14 Me. 449; Solomon v. Bank of England, 13 East, 135, note b; Haley v. Lane, 2 Atk. 182; Woodman v. Churchill, 52 Me. 58; Woodworth v. Huntoon, 40 Ill. 131; Bassett v. Avery, 15 Ohio St. 299; Watson v. Flanagan, 14 Tex. 354; Masters v. Ibberson, 8 C. B. 100; Prentice v. Zane, 2 Gratt. 262; Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Simonds v. Merritt, 33 Iowa, 537; Peabody v. Rees, 18 id. 571; Mornyer v. Cooper, 35 id. 257; Boyd v. McCann, 10 Md. 118; Cook v. Larkin, 19 La. Ann. 507. See Kost v. Bender, 25 Mich. 515.

<sup>2</sup> Huff v. Wagner, 63 Barb. 215; Hargee v. Wilson, id. 237.

In Huff v. Wagner Talcott, J., discusses this point: "The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value he has paid. This, I think, is correct. The protection of the holder in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why a *bona fide* holder

of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded; namely, that he has lost nothing by his reliance upon the face of the paper. These principles are discussed and laid down in a very elaborate opinion of the late chancellor, delivered in the court of errors in the leading case of Stalker v. McDonald, 6 Hill, 93, in which he expressly holds that if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*; and refers with approbation to the case of Edwards v. Jones, 7 C. & P. 633, in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advance. The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder, without notice of the invalidity of the note, may recover the entire face thereof, without reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for \$1,000 to recover

sideration exists in the inception of the paper, it seems that in New York the *bona fide* holder may recover the full

the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice for only \$100—a result revolting to common sense, and going far beyond affording that protection which public policy requires should be extended to the parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and [108] one where the note is exchanged for property. If such a distinction could be made the maker of the note would have no protection. Such notes would then be used in the purchase of property, as in this case, instead of sold for money. The purchaser is fully protected against loss by being enabled to recover the full value of the property parted with on the purchase.

“The doctrine laid down in *Stalker v. McDonald* was also expressly held in *Williams v. Smith*, 2 Hill, 301, and in *Youngs v. Lee*, 18 Barb. 187, in which Mr. Justice Welles, delivering the opinion of the court, said: ‘It follows that the plaintiffs are *bona fide* purchasers and holders of the note upon which the action is brought, and entitled to recover from the indorsers the amount they paid for it *and no more*.’ The case of *Youngs v. Lee* was affirmed on appeal. 12 N. Y. 551. The same principle was asserted in *Cardwell v. Hicks*, 37 Barb. 458. The truth is, that in such cases the holder, except so far as he has parted with value, has no equity superior to that of the party defrauded. There is a remarkable silence on this precise point in most of the elementary works I have examined. It is, however, explicitly

laid down in *Story on Bills*, § 188, that where a bill has been obtained by fraud a *bona fide* holder can only recover the amount he has advanced. The English cases, where a question of this character appears to have been presented, appear, generally, to have been between the *bona fide* holder and the accommodation maker or indorser; and in such cases it has always been ruled that the holder only recovers the amount of his advances. See *Chitty on Bills*, 81; *Nash v. Brown*, id. 81, note 1; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304; *Simpson v. Clarke*, 2 Cr., M. & R. 343. I do not perceive any reason why a *bona fide* holder for value may not recover the full face of the note without regard to the amount he has advanced, as well where he sues a mere accommodation maker as where he sues one from whom the note was obtained by fraud. In either case the amount of the recovery is limited to the amount advanced by the holder, because there was no sufficient valid and valuable consideration for the making of the note; and the right to recover at all grows out of the advance which has been made by the holder, which gives it validity in his hands to that extent. I think the discussions and opinions in the English cases show that this point has not been considered debatable where the note was obtained by false and fraudulent representations. Indeed, I think that until quite recently it has been assumed at *nisi prius* in this state that a holder of such paper for value and without notice was entitled to be protected to the extent of his advances, and no more. The point has been expressly decided in



amount, no matter what amount he may give for it.<sup>1</sup> This seems to us the true distinction in such cases. If the paper is issued in fraud without consideration, the *bona fide* purchaser should be limited in recovery to the amount paid with

Holman v. Hobson, 8 Humph. (Tenn.) 127, and in Bethune v. McCreary, 8 Ga. 114.

"It is claimed by the counsel for the respondent that the case of The Essex County Bank v. Russell, 29 N. Y. 673, countenances the doctrine maintained by him. There a bank had discounted or purchased a note which was diverted, and gave as the proceeds of the discount a part in cash and the balance in a note held by it, made by one Brewster, and indorsed by other parties, which was past due and under protest. The bank was allowed to recover the whole amount of the diverted note, on the ground that it was a *bona fide* holder for value, and upon the express ground that the Brewster note which constituted a part of the consideration on the purchase, although under protest, was worth its nominal amount, and was good and collectible. And the principle laid down in Stalker v. McDonald, on this point, seems to have been expressly recognized as law. Mr. Justice Hogeboom says, speaking of the plaintiffs (the bank): 'They were, therefore, on discounting this note, *bona fide* holders of it for value, at least to the extent of the sum advanced in cash, on the discount; and to that extent, at all events, they would be entitled to recover in this action. . . . It becomes necessary to determine whether the plaintiffs are *bona fide* holders of the note in suit, in such a sense as to exclude

the defense of its misapplication, so far as respects the part of the discount which was appropriated to the purchase of the Brewster paper. *There was no want of consideration on the part of the plaintiff to the full amount of the note in suit in the transaction in question. The Brewster note was, though overdue, good and collectible paper. It was worth its nominal amount, and was collectible for two years afterwards.* It was a chose in action which the plaintiff had a right to sell and transfer to Comstock. To the full extent of its value it was a valuable consideration.' The case of The Park Bank v. Watson, 42 N. Y. 490, is claimed by the counsel for the appellant to have overruled the former cases on the subject and to have established the doctrine for which he contends. In that case the Park Bank had surrendered notes held as collateral security for a debt due it, on receiving the notes in suit, which proved [109] to have been diverted. One of the notes surrendered was the note of Thomas Parks, shown on the trial to be irresponsible. The defendant's counsel had requested the court to charge 'that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note.' The request being refused, an exception was taken. The only opinion in the case is that of Judge Lott, who says: 'The surrender of those notes, under the decision in Brown v. Leavitt, 31 N. Y. 113,

<sup>1</sup> 1 Neg. Inst. (4th ed.), § 758, referring to Howe v. Potter, 61 Barb. 357. "In this case nothing is said as to the

amount reserved by the holder, but it appears to have been a full recovery upon the draft."

interest.<sup>1</sup> But if there was an original valid consideration, or the paper was issued fairly and intentionally without consideration, then he is entitled to recover the whole amount regardless of the amount he pays."<sup>2</sup> The doctrine of the text is not sustained by some courts. Thus it is said in Iowa: "The defense that a note has been obtained fraudulently, or without consideration, does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense does

and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks.'

"The question in *Brown v. Leavitt* was simply whether the surrender and delivery up to the debtor of an existing note, and receiving another in payment of it, constituted a valuable consideration within the meaning of the rule which protects a *bona fide* purchaser for value against defenses existing between prior parties; and neither in that case, nor in any one of the cases there cited, was any question presented like that in the case at bar; unless it be in the cases of *Stalker v. McDonald* and *Youngs v. Lee*, in which cases the doctrine laid down was, as we have seen, directly contrary to the position of the appellant here. I have looked into the original points and case on the argument in the court of appeals of *The Park Bank v. Watson*, and find that it was claimed there by the plaintiff that, notwithstanding the evidence touching the irresponsibility of Parks, the maker of one of the notes surrendered, his note was nevertheless of value, and would probably have been paid. It cannot be affirmed that a particular note of a party, shown to be of the character and in the position such as that of Parks, is wholly valueless. Now the request of the counsel for the defend-

ant in that case was that the judge charge that the entire amount of the Parks note must be deducted from any recovery. Upon well settled practice this request was too broad, as the note of Parks had some value, and an exception to the refusal to charge as requested was therefore unavailable; and the remark of Justice Lott, which has been quoted, so far as it is supposed to countenance the idea that the holder of negotiable paper, in good faith, for value, to which there is a defense as against the party from whom the holder received it, may recover the full face of the paper without regard to the amount he has paid for it, if not inadvertent, was at least unnecessary to the decision, and wholly unsupported by the authorities on which it was supposed to have been placed." *Gilbert v. Duncan*, 29 N. J. L. 133; *Holcomb v. Wyckoff*, 35 id. 35; *Moore v. Ryder*, 65 N. Y. 438; *Todd v. Shelbourne*, 8 Hun, 510; *Ingalls v. Lee*, 9 Barb. 647; *Allaire v. Harts-horne*, 21 N. J. L. 665; *Robbins v. Maidstone*, 4 Q. B. 811; *Williams v. Smith*, 2 Hill, 301; *Valette v. Mason, Smith (Ind.)*, 89; *Cook v. Cockrill*, 1 Stew. 475. See *Grand Rapids, etc. R. Co. v. Sanders*, 17 Hun, 552.

<sup>1</sup> *Holcomb v. Wyckoff*, 35 N. J. L. 38.

<sup>2</sup> See *Daniels v. Wilson*, 21 Minn. 530.

avail, for without such defense he would recover the amount evidenced by the note.”<sup>1</sup> And in Michigan that “the maker of a note has no concern with the amount paid for it by a *bona fide* purchaser.”<sup>2</sup> This is the doctrine of the federal supreme court where the purchaser of a negotiable security is not individually chargeable with fraud.<sup>3</sup> If the maker of a non-negotiable note is not responsible for the value of it as it is expressed on its face an assignee cannot collect such value from his assignor if the latter shows that the price paid him for it was less than its face. *Prima facie* that is its value; but it is not conclusively so. The assignor's liability is the amount received with interest.<sup>4</sup>

[110] § 542. **Want or failure of consideration.** It is essential to the validity of every contract that it be based on a sufficient consideration. Notes and bills are not exceptions; some consideration there must be;<sup>5</sup> but they import a consideration; that is, in the absence of any express admission a consideration is presumed by law to exist, not only between the original parties, as maker and payee of the note, or drawer and acceptor of a bill, but also between other and subsequent parties. In suing upon these contracts no special averment or proof of consideration is necessary;<sup>6</sup> the aver-

<sup>1</sup> Lay v. Wissman, 36 Iowa, 305.

<sup>2</sup> Vinton v. Peck, 14 Mich. 287, 296.

<sup>3</sup> Cromwell v. County of Sac, 96 U. S. 60; Railroad Cos. v. Schutte, 103 id. 118.

<sup>4</sup> Foust v. Gregg, 68 Ind. 399; Schmied v. Frank, 86 Ind. 250.

<sup>5</sup> Fowler v. Shearer, 7 Mass. 14, 22; Jennison v. Stone, 33 Mich. 99.

<sup>6</sup> In Bourne v. Ward, 51 Me. 191, it was held that negotiable notes, when they have passed into the hands of indorsees in the usual course of trade, enjoy the privilege of having a consideration presumed. But notes not negotiable, and negotiable notes while in the hands of the payee, enjoy no such privilege. Bristol v. Warner, 19 Conn. 7; Delano v. Bartlett, 6 Cush. 364; Burnham v. Allen, 1 Gray, 496. If they contain

the words “value received,” they are *prima facie* evidence of consideration. See Holliday v. Atkinson, 5 B. & C. 501; Bristol v. Warner, 19 Conn. 7. In Richardson v. Comstock, 21 Ark. 69, it is held that a note in the hands of the payee is *prima facie* evidence of consideration, the words “value received” being in it. The opinion says, “the note upon its face furnishing *prima facie* evidence of consideration, as held by a series of adjudications of this court.” Gage v. Melton, 1 Ark. 228; Rankin v. Badgett, 5 Ark. 346; Greer v. George, 8 Ark. 133; Cheney v. Higginbotham, 10 id. 273; Dickson v. Burks, 11 id. 307. The cases in 8 and 10 Ark. were upon promissory notes — but the notes are not set out — and whether the words “value received”

ment and proof of a contract of such nature includes [111] this essential element. But the presumption of consideration is not conclusive between the immediate parties, nor, indeed, between remote parties, except in favor of a *bona fide* holder for value.<sup>1</sup>

It is not within the object of the writer to discuss in detail the law which defines a *bona fide* holder for value; but rather what deductions are authorized where the paper is open to defenses. If there is a total *want* or a total *failure* of consideration, there can be no recovery; the essential basis of a binding contract is then shown to be wanting.<sup>2</sup> Fraud vitiates a contract; and, at the election of the defrauded party, it may be avoided; but, if not avoided by him, it is only available

are in them or not does not appear. The decisions seem to proceed on the ground that, as promissory notes, they import a consideration. Story on Prom. Notes, § 181; Chitty on Bills, pp. 78, 85. Where one consideration of a note has been negatived by breach of warranty, there can be no presumption, in the absence of evidence, that there was any other. In such a case the maker is not obliged to prove that there was no other consideration. Aldrich v. Stockwell, 9 Allen, 45.

<sup>1</sup> Hoffman v. Bank of Milwaukee, 12 Wall. 181; Lenheim v. Fay, 27 Mich. 70; Crossly v. Ham, 13 East, 498; Goodman v. Harvey, 4 A. & E. 870; Hannover v. Doane, 12 Wall. 342; Andrews v. Pond, 13 Pet. 65; Skilding v. Warren, 15 Johns. 270; Fisher v. Leland, 4 Cush. 456; Ryland v. Brown, 2 Head, 270; Norvell v. Hudgins, 4 Munf. 496; Harrisburg Bank v. Meyer, 6 S. & R. 537; Thrall v. Horton, 44 Vt. 386; Lawrence v. Stonington Bank, 6 Conn. 521; Taylor v. Mather, 3 T. R. 83, note; Brown v. Davies, id. 80; Ayers v. Hutchins, 4 Mass. 370; Thompson v. Hale, 6 Pick. 259; Boggs v. Lancaster Bank, 7 W. & S. 331; Tucker v. Smith, 4

Me. 415; Brown v. Turner, 7 T. R. 630; Conger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warner, id. 259; Amory v. Merryweather, 2 B. & C. 573; Evans v. Kymmer, 1 B. & Ad. 528; Kasson v. Smith, 9 Wend. 437; Steers v. Lashley, 6 T. R. 61; Walker v. Hagerty, 46 N. W. Rep. 221; 30 Neb. 120.

<sup>2</sup> Warner v. Crouch, 14 Allen, 163; Starr v. Torrey, 22 N. J. L. 190; Buckles v. Cunningham, 6 S. & M. 358; Clough v. Patrick, 37 Vt. 421; Grant v. Townsend, 2 Hill, 554; Sawyer v. Chambers, 44 Barb. 42; Cragin v. Fowler, 34 Vt. 326; Payne v. Cutler, 13 Wend. 605; French v. Gordon, 10 Kan. 370; O'Neal v. Bacon, 1 Houst. (Del.) 215; Morrill v. Aden, 19 Vt. 505; Case v. Gerrish, 15 Pick. 49; Rice v. Goddard, 14 id. 293; Dickinson v. Hall, id. 217; Joliffe v. Collins, 21 Mo. 338; Smith v. Brooks, 18 Ga. 440; Washburn v. Picot, 3 Dev. 390; Aldrich v. Stockwell, 9 Allen, 45; Tillotson v. Grapes, 4 N. H. 444; Dunbar v. Marden, 13 id. 311; Jackson v. Warwick, 7 T. R. 121. See Diefendorff v. Gage, 7 Barb. 18; Fitch v. Redding, 4 Sandf. 130.



[112] as ground for a cross-action or recoupment, which is of the same nature; or as a defense where the fraud has directly caused a want or failure of consideration.<sup>1</sup> A total failure of consideration nullifies a contract equally as a total want of consideration prevents its inception. Accommodation paper is without consideration in the hands of the accommodated parties.<sup>2</sup> Nor can a note be supported as a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and, until then, the party may revoke his promise.<sup>3</sup> If a note or bill be given for property as purchased which has no existence, there is no consideration;<sup>4</sup> and it is the same if property bought is wholly without value.<sup>5</sup> A note or bill given for the price of a void or worthless patent right is without consideration.<sup>6</sup> So a contract by note, bill or otherwise, to pay purchase-money of land conveyed by a void deed, as when made by a married woman;<sup>7</sup> or by a valid deed with covenants of warranty, by which no right or title passes.<sup>8</sup> And where property, either personal or real, is purchased with warranty of title or quality, and it turns out that there is no title in the vendor, or that the property is destitute of the warranted quality and is worthless, and no actual benefit

<sup>1</sup> *Andrews v. Wheaton*, 23 Conn. 112; *Wright v. Irwin*, 33 Mich. 32; *Thornton v. Wynn*, 12 Wheat. 183; *Withers v. Greene*, 9 How. (U. S.) 213; *Drew v. Towle*, 27 N. H. 412; *Stone v. Peake*, 16 Vt. 213; *Clopton v. Elkin*, 49 Miss. 95; *Nichols v. Huntington*, 45 N. H. 470; *Southall v. Rigg*, 4 Eng. L. & Eq. 366; S. C., 20 L. J. (C. P.) 145; *French v. Gordon*, 10 Kan. 370; *Morrill v. Aden*, 19 Vt. 505; *Lewis v. Cosgrave*, 2 Taunt. 2. See *Carpenter v. Phillips*, 2 Houst. (Del.) 524.

<sup>2</sup> *Jackson v. Warwick*, 7 T. R. 121; *Knight v. Hunt*, 5 Bing. 432; *Sparrow v. Chisman*, 9 B. & C. 241; *Thompson v. Clubley*, 1 M. & W. 212.  
<sup>3</sup> *Nash v. Brown*, *Chitty on Bills*, \*74, note x; *Edw. on Bills & N.* 307; *Fink v. Cox*, 18 Johns. 145; *Easton v. Pratchett*, 1 Cr., M. & R. 798.

<sup>4</sup> 2 Kent's Com. \*468; *Hastie v. Couturier*, 9 Exch. 102; *Barr v. Gibson*, 3 M. & W. 390; *Strickland v. Turner*, 7 Exch. 208; *Allen v. Hammond*, 11 Pet. 63.

<sup>5</sup> *Arnold v. Wilts*, 86 Ind. 368; *Brown v. Weldon*, 27 Mo. App. 251; *Shepherd v. Temple*, 3 N. H. 455; *Ramsey v. Sargent*, 21 id. 397; *Perley v. Balch*, 23 Pick. 283; *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

<sup>6</sup> *Smith v. Hightower*, 76 Ga. 630; *Clough v. Patrick*, 37 Vt. 421; *Joliffe v. Collins*, 21 Mo. 338; *Dickinson v. Hall*, 14 Pick. 217. But see *Miller v. Finley*, 26 Mich. 249.

<sup>7</sup> *Warner v. Crouch*, 14 Allen, 163; *Grout v. Townsend*, 2 Hill, 554.

<sup>8</sup> *Rice v. Goddard*, 14 Pick. 293; *Fisher v. Salmon*, 1 Cal. 413.

is transferred to the purchaser, the warranties will not constitute a consideration.<sup>1</sup>

Where the maker and payee of a note were owners of [113] land, and the former took a conveyance of it to sell it on joint account, and gave the note as security for prompt payment of the purchase-money when the land should be sold, a defense to the note of a want of consideration was held good until the sale was made.<sup>2</sup> A want of consideration destroys the validity of a contract without regard to the *bona fides* of the transaction; as where the defendant promised as administrator to pay a given sum for value received by one of the heirs of the intestate; or where a debtor pays part of his debt before it is due, and a note is given him instead of a receipt to show that he is allowed interest on the sum paid; or where a note is given in renewal of another which was not founded on any consideration; or is given to a widow for a debt due to her deceased husband's representatives; or where it is given to the mother of a child that has been beaten to stay a prosecution for the injury; or where it is given on a mere moral or honorary obligation, not on anything which the law esteems a valuable consideration.<sup>3</sup> A total failure of consideration occurs where there was a consideration at the inception of the contract and it subsequently becomes wholly nugatory. This may be illustrated by a note or bill given for the purchase-money of goods to be subsequently delivered at a stated time, and a failure to deliver the same.<sup>4</sup> Where a note was given in consideration of the relation of apprenticeship which the parties supposed was to be created between the maker's son and the payee, but which relation at the time of the trial it appeared never did exist between them, it was

<sup>1</sup> Rice v. Goddard, 14 Pick. 293; Dickinson v. Hall, id. 217; Aldrich v. Stockwell, 9 Allen, 45; Shepherd v. Temple, 3 N. H. 455; Mason v. Wait, 5 Ill. 127. See Owings v. Thompson, 4 id. 502; Vincent v. Morrison, 1 id. 227; Lamerson v. Marvin, 8 Barb. 9; Hoy v. Taliaferro, 8 Sm. & M. 727; Furniss v. Williams, 11 Ill. 229; Clark v. Snelling, 1 Ired. 382; Wilson v. Jordan, 3 Stew. & P. 92.

<sup>2</sup> Marsh v. Bennett, 22 Ill. 313.

<sup>3</sup> Edwards on Bills, 327; Ten Eyck v. Vanderpool, 8 Johns. 120; Schoonmaker v. Roosa, 17 id. 300; Crofts v. Beale, 5 Eng. L. & Eq. 408; S. C. 20 L. J. (C. P.) 186; 15 Jur. 709; Slade v. Halstead, 7 Cow. 322; Geiger v. Cook, 3 W. & S. 266; Bryan v. Philpot, 3 Ired. L. 467; Heast v. Sybert, Cheeves, 177.

<sup>4</sup> Wells v. Hopkins, 5 M. & W. 7.

held the consideration wholly failed. By the statute of Anne [114] the duty was laid on the master in consideration of the premium received by him to have the same inserted in the indenture, and that instrument properly stamped. He having failed to perform that duty, and the time for it having expired, the relation was not instituted.<sup>1</sup>

§ 543. **Partial want of consideration.** Partial want of consideration avoids a note or bill *pro tanto* where the holder is subject to defenses relating to the consideration; as where a note is given on a settlement of account by mistake for more than is due;<sup>2</sup> and where a bill is drawn as to part for value, and as to the remainder for the accommodation of the plaintiff, the recovery will be limited to the consideration of value;<sup>3</sup> and it may be stated generally that where a note or bill is given for several distinct considerations and one is not a consideration which the law deems valuable, so much of the promise as is founded upon that consideration is void, and there will be a deduction from the amount of the paper of so much as was included for that element of the consideration which is invalid;<sup>4</sup> and this partial defense is available although the amounts of the several considerations are not liquidated and fixed by the parties. In such case if one of two independent considerations on which a note is founded is one which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned as between the original parties or such as have the same relative rights, and the holder will recover to the extent of the valid consideration and no further; and the question what amount was founded

<sup>1</sup> Jackson v. Warwick, 7 T. R. 121.

<sup>2</sup> Mercer v. Clark, 3 Bibb. 224; Phetteplace v. Steere, 2 Johns. 442; Forman v. Wright, 11 C. B. 481. See Briscoe v. Kenealy, 8 Mo. App. 76.

<sup>3</sup> Darnell v. Williams, 2 Stark. 166.

<sup>4</sup> Bates v. Butler, 46 Me. 387; Parish v. Stone, 14 Pick. 198; Collins Iron Co. v. Burkam, 10 Mich. 283; Great Western Ins. Co. v. Rees, 29 Ill. 272; Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213; Wilson v. Forder, 20 Ohio St. 89; Barber v.

Backhouse, Peake, 61; Sparrow v. Chrisman, 9 B. & C. 241; Lewis v. Cosgrave, 2 Taunt. 2; Wintle v. Crowther, 1 Tyr. 213; Gascoyne v. Smith, McClel. & Y. 338; Stephens v. Wilkinson, 2 B. & Ad. 320; Barker v. Morton, 7 Up. Can. App. 114; Allaire v. Hartshorne, 21 N. J. L. 665; Payne v. Ladue, 1 Hill, 116. But see Lash v. McCormick, 17 Minn. 403; Walters v. Armstrong, 5 id. 448; Leighton v. Grant, 20 id. 345; Whitacre v. Culver, 9 id. 295.

on one consideration and what on the other will be settled by the jury upon the evidence.<sup>1</sup> [115]

§ 544. **Partial failure of consideration.** A partial failure of consideration is a subject on which there has been much conflict of authority. On principle there should be no difference between partial failure and partial want of consideration in respect to the mode of arriving at certainty of [116]

<sup>1</sup> Parish v. Stone, 14 Pick. 198; Loring v. Sumner, 23 Pick. 98.

In Parish v. Stone, Shaw, C. J., said: "It seems very clear that want of consideration, either total or partial, may always be shown by way of defense: and that it will bar the action, or reduce the damages from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such a case depend upon the state of the evidence whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended in a great degree to be gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt and what a gratuity. The rule to be deduced from the cases seems to be this: that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle there seems to be no reason why it shall depend upon the state of the evidence showing that these different parts

can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration. Suppose a father proposes, upon his son going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum; but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant show the want of consideration by way of defense *pro tanto*? And yet the amount must be settled by a jury; the evidence of the original agreement not distinguishing between what was payment and what was gratuity." *Pacific Iron Works v. Newhall*, 34 Conn. 67.



amount to be deducted on that account. Wherever the amount is provable for the purpose of a defense *pro tanto* on the ground of a partial want of consideration it ought to be provable for a like defense if the consideration has partially failed. In an English case, decided in 1824, it was declared that a partial failure of the consideration of a promissory note constitutes no ground of defense, if the *quantum* to be deducted on that account is not of definite computation, but of unliquidated damages.<sup>1</sup> It was a case in which, according to the report, the real ground of complaint was inadequacy, and not part failure of consideration. A note was given for 20*l.* for the plaintiffs' disclosing to the defendant an improvement in certain machinery, which turned out to be *less beneficial* than was anticipated by the parties. The improvement was not entirely useless; and therefore the sum agreed to be paid for the disclosure, although disproportionate to the benefit received, was not without consideration. In the absence of any warranty, or undertaking of the promisee in respect to the extent to which the improvement should be beneficial, the promisor bought the disclosure for such benefit, more or less, as he could derive from it; if small, he was obliged to be content; no element he had contracted for and had a right to exact from the seller was wanting; if large, even beyond expectation, the seller was obliged to be content; he reserved no right to require more to be paid.<sup>2</sup>

There is an important difference between a want or failure of consideration and its inadequacy. If the consideration is of value, it is sufficient, although it is not adequate in the sense of being equal. A consideration is not deficient merely because the undertaking based upon it is of very much greater value. No defense of want or failure of consideration can be grounded on any such disparity. There is no want of consideration where the promisor has received all he bargained for, and it is of some value; nor is there, under such conditions, a failure of consideration. It is enough that he gets all that he is entitled to exact from the other. A party entering into a contract is admonished by the law that it fixes no values ex-  
[117] cept of money; that the amount which may be recovered

<sup>1</sup> Day v. Nix, 9 Moore, 159.

<sup>2</sup> See Agra v. Leighton, L. R. 2 Exch. 56.

from him on his express promise is not the absolute value of what he receives, as evidence might establish it, but the sum which he agrees, on his own judgment, and with a view to his own purposes, to pay for it. A purchaser is subject to the rule of *caveat emptor*; and although he may suppose that the subject of purchase has qualities of which it is in fact destitute, and for that reason engages to pay a sum for it greatly in excess of the true value, he is entitled to no redress on that account, and can ask for no abatement of the requirements of his contract in any such case which is unaffected by fraud or warranty.

In modern times the necessity for bringing cross-actions has been abridged by the practice and legislation increasing the scope of defenses as to matters connected with the consideration, not only of commercial paper, but of all other contracts. By the common law, even in an action on a *quantum meruit* for work done, there was, as late as the beginning of the present century, a hesitation in the English courts to allow the defendant to prove in reduction of damages that the work was done in an improper and insufficient manner; it was doubted whether a cross-action should not be brought.<sup>1</sup> In an action of *assumpsit* for rebuilding the front of a house the defendant showed under a plea of *non assumpsit* that the work was badly done. There was a conference of the English judges in respect to allowing such defense. Its allowance was treated as a departure from the previous practice.<sup>2</sup> It was resolved that the correct rule was, that if there has been no beneficial service there should be no pay; but if some benefit has been derived, though not to the extent expected, this should go to the amount of the plaintiff's demand.<sup>3</sup> Lord Ellenborough said: "Where a specific sum has been agreed to be paid by the defendant the plaintiff may have some ground to complain of surprise if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specified sum and the work done. But where the plaintiff comes into [118]

<sup>1</sup> *Basten v. Butter*, 7 East, 479.

<sup>3</sup> *Ibid.*

<sup>2</sup> *Farnsworth v. Garrard*, 1 Camp.

court upon a *quantum meruit* he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice.”<sup>1</sup> And it was added by another member of the court, that “if even a specific sum had been agreed to be paid, and notice given, then the defendant should be let into the defense. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed the plaintiff would not have done that which he engaged to do, the doing of which would be the consideration of the defendant’s promise to pay, and the foundation on which his claims to the price stipulated for would rest; and, therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly.”<sup>2</sup> Thus the practice came into vogue of making defenses, for defect of consideration, to actions for fixed or agreed sums. But this was not permitted in England where a note or bill had been given. It was held there pretty uniformly that a partial failure of consideration was no defense in such cases.<sup>3</sup> The giving of such paper was treated, in respect to such a defense, as the payment of so much cash.<sup>4</sup> This distinction has not been recognized by the American courts. Where the action is between the original parties or others holding the paper subject to defenses, a partial failure of consideration can be set up as a partial defense; in the latter case it is available to the same extent as though the action were brought by the original party and founded on the original contract or consideration.<sup>5</sup>

§ 545. **Same subject.** Many American cases hold that a partial failure of consideration is not available; that the defendant must resort to his cross-action.<sup>6</sup> Occasionally a partial failure is allowed if the amount to be deducted on that

<sup>1</sup> *Basten v. Butter*, 7 East, 479.

<sup>2</sup> *Id.*, per Lawrence, J.

<sup>3</sup> *Morgan v. Richardson*, 1 Camp. 40; *Tye v. Gwynne*, 2 id. 346; *Trickey v. Larne*, 6 M. & W. 278; *Sully v. Frean*, 10 Exch. 535; *Georgian Bay L. Co. v. Thompson*, 35 Up. Can. Q. B. 64; *Gascoyne v. Smith*, McC. & Y. 338.

But see *De Sewhanberg v. Buchanan*, 5 C. & P. 343.

<sup>4</sup> *Warwick v. Nairn*, 10 Exch. 762; *Jones v. Jones*, 6 M. & W. 84.

<sup>5</sup> *Wyckoff v. Runyan*, 33 N. J. L. 167; *Batterman v. Pierce*, 3 Hill, 171; *Smith v. Smith*, 30 Vt. 139.

<sup>6</sup> *Washburn v. Picot*, 3 Dev. L. 390;

account is liquidated and may be ascertained by mere computation. In a New Hampshire case a note was given for seventeen articles of machinery, with no separate valuation; five of the articles were at the time under a valid attachment against the vendor, and were afterwards sold under execution in the attachment suit. In an action on the note an abatement was claimed by the defendant for part failure of consideration because of their loss. The court say: "To this extent the consideration has failed; and had there been a specific value fixed to the articles when the defendant purchased them, the amount could now be deducted and allowed in this suit. But the value was not fixed. The whole seventeen articles were sold for \$1,200, and whether these five were worth five-seventeenths of that sum, or one-half, or one-third, or what they were worth, is a matter entirely unliquidated; and upon the authorities cited, the ruling of the court excluding the defense was correct."<sup>1</sup> This strict rule has been changed in that state and in several others by statute;<sup>2</sup> and in many others it has been departed from upon general principles. In Maine an action was brought on a note given for the good will and practice of a physician; the defense was that after a certain period subsequent to the sale the vendor resumed practice in the same town. It was held that by such resumption the vendor deprived the defendant of a part of the consideration of the note, and although the injury was unliquidated it might be proved in mitigation of damages. Wells, J., said: "If there be a sale of two chattels for a gross sum and a note given for the price, and one of the chattels is not the property of the vendor, and a partial want of consideration may be shown, why should not the same defense be allowed if both of the chattels were the property of the vendor, and the title passed to the vendee, but the vendor destroyed one of them before delivery? In one case there is a want of consideration [120]

Russell v. Splater, 47 Vt. 273; Berlin v. Schermerhorn, 21 Vt. 189; Jordan v. Jordan, Dud. (Ga.) 181; Hinton v. Scott, id. 245; Scudder v. Andrews, 2 McLean, 464; Stone v. Peake, 16 Vt. 213; Carpenter v. Phillips, 2 Houst. (Del.) 524; Thrall v. Horton, 44 Vt. 336; McClain v. Williams, 8 Yerg. 230; Merrill v. Aden, 19 Vt. 505; Craigin v. Fowler, 34 Vt. 326; Hackett v. Schad, 3 Bush, 353.  
<sup>1</sup>Riddle v. Gage, 37 N. H. 519; Drew v. Towle, 27 N. H. 412; Kirkpatrick v. Muirhead, 16 Pa. St. 117. See Dyer v. Homer, 22 Pick. 253.  
<sup>2</sup>Clough v. Baker, 48 N. H. 254.



at the time when the contract is made to the extent of the value of one of the chattels; in the other a failure of it to the same extent caused by the misconduct of the vendor. There does not appear to be any good reason why the maker of the note might not defend on one ground as well as the other."<sup>1</sup> In Minnesota and Oregon it has been held that a partial failure of consideration, though unliquidated, is available as a defense to the extent of the failure.<sup>2</sup>

A partial failure of consideration of a note given for the price of property sold, caused by breach of warranty, fraudulent misrepresentations or fraudulent overcharge, may be shown in mitigation of damages.<sup>3</sup> A covinous note given to defraud creditors cannot be avoided by the maker for the fraud; it may be enforced against him; the statute declares the invalidity of the note only as to the party or parties [121] whose right, debt or duty is attempted to be avoided.<sup>4</sup>

<sup>1</sup> *Herbert v. Ford*, 29 Me. 546. The learned judge continued: "Accordingly it was held in *Dyer v. Homer*, 22 Pick. 253, where there was a sale of chattels which was considered valid between the parties, but not so as to attaching creditors, and some of the chattels were taken and held by an attaching creditor, that the maker of the note given for them might prove the failure of the consideration in an action on the note.

. . . If Clark, by resuming his practice, has prevented the defendant from enjoying the entire benefit of the contract, he ought not, through the plaintiff (the vendor's agent, to whom the note was payable), to be permitted to recover compensation for that which he has agreed the defendant shall enjoy, when by his own interference the defendant has been deprived of it. Clark is responsible in damages if there has been a breach of his contract; but it does not appear from the current of authorities that the defendant is limited to that remedy alone. The consideration of the con-

tract was the good will of the practice, and so far as that has been taken away by Clark there is manifestly a failure of it. The tendency of decisions in this country has been to allow a broader latitude of defense than was permitted by the rigid rules of the common law to bills of exchange and promissory notes, where the justice of the case required it, and a circuity of action could be avoided."

A similar decision was made in *Stacey v. Kemp*, 97 Mass. 166, under the name of reducing the damages. See *Hodgkins v. Moulton*, 100 id. 309.

<sup>2</sup> *Bisbee v. Torinus*, 26 Minn. 165; *Davis v. Wait*, 12 Ore. 425.

<sup>3</sup> *Aultman v. Mason*, 83 Ga. 212; *Merrill v. Taylor*, 72 Texas, 293; *Burton v. Stewart*, 3 Wend. 236; *Harrington v. Stratton*, 22 Pick. 510; *Coburn v. Ware*, 30 Me. 202; *Ham-matt v. Emerson*, 27 id. 308; *Haycock v. Rand*, 5 Cush. 26; *Welch v. Hoyt*, 24 Ill. 117; *Lewis v. Cosgrave*, 2 Taunt. 2.

<sup>4</sup> *Carpenter v. McClure*, 39 Vt. 9.

So a partial failure may be given in evidence to reduce damages where part of the articles for which the note was given were unskilfully manufactured, and not in compliance with the contract;<sup>1</sup> and to the extent of the depreciation, where a note is given for depreciated currency loaned at the nominal amount; and where a note is payable to a bank, and its depreciated bills have been duly tendered in payment.<sup>2</sup> So a note given for prospective work which fails in part to be done by reason of the death of the payee is subject to a deduction proportioned to the amount of work left unperformed.<sup>3</sup> But it has been held that the consideration of a premium note to an insurance company cannot be impeached by showing that the company became insolvent during the period of the insurance, for the rights of other persons were involved.<sup>4</sup> And in other cases the amount of the failure of consideration may be of so uncertain a nature as to be incapable of any estimate, even upon testimony; and therefore the court will not make any inquiry concerning it.<sup>5</sup> But where a purchaser of personal property transferred and indorsed a note of a third person in payment, amounting to more than the purchase price, and received the vendor's note for the excess, on which he brought suit, it was held that such vendor, to establish entire failure of consideration, might show that the maker of the indorsed note was insolvent so that a suit thereon would be unavailing; and he need not release any part of the plaintiff's responsibility as indorser, for his liability would be limited to the amount received as consideration therefor.<sup>6</sup>

§ 546. **Same subject.** A want or failure of consideration in a strict sense is a mere negation; as a defense it rests on the idea and principle of there being no valid contract; that it was wholly or partially void from the beginning, [122] or afterwards wholly or partially ceased to be binding, because lacking or losing this indispensable support. The dis-

<sup>1</sup> Spalding v. Vandercook, 2 Wend. 431. See Payne v. Cutler, 13 id. 605.

<sup>2</sup> Commercial & R. Bank v. Atherton, 1 Sm. & M. 641; Scott v. Hamblin, 3 id. 285.

<sup>3</sup> Clendinen v. Black, 2 Bailey, 488. See Gleason v. Clark, 9 Cow. 57, holding that evidence of negligence in

the performance of professional services may be given in evidence under notice to reduce the amount.

<sup>4</sup> Sterling v. Mercantile Ins. Co., 32 Pa. St. 75.

<sup>5</sup> Pulsifer v. Hotchkiss, 12 Conn. 234.

<sup>6</sup> Litchfield v. Allen, 7 Ala. 779.

tion is very obvious between a full or partial defense based on the theory that the plaintiff's demand in whole or in part never had any valid existence; and a defense which concedes the existence of such demand, and succeeds by canceling or reducing that demand by setting up a counter-claim. The latter mode of defense, under the name of *recoupment*, has been considered.<sup>1</sup>

To the extent that there is either a want or failure of consideration, as distinguished from mere inadequacy, the law in some form affords relief. If *wanting* as to a part of the contract, as we have seen, the contract is void *pro tanto* in its inception; there can be no recovery for such part, whether it is apportionable by mere computation from *data* in the contract, or must be ascertained by a jury upon testimony, and whether the action is upon the original contract or upon a note or bill. So far the English and American authorities agree. A partial failure of consideration generally, if not invariably, admits of another remedy by cross-action. Such failure may arise from accident, and afford ground for rescission of the entire contract; as where some element or incident stipulated for in an executory purchase, and which is the leading inducement thereto, has ceased to exist before complete performance. A subsequent completion of the purchase would be a waiver of the objection. But if the value of the subject-matter of a purchase be impaired before delivery by the tortious act or the neglect of duty of the vendor recovery may be had therefor in a separate action, or it may be the ground of an abatement of the purchase price. A partial failure of consideration may also arise from the default of the plaintiff in performance of some concurrent or precedent agreement; or may result from some act or default of the plaintiff, equivalent to a breach of some agreement subsequently to be performed, and which was the consideration of the promise sued on. In the case of mutual agreements, performance on one side is the consideration of the performance on the other, [123] where they are concurrent or dependent. If one party fails to perform his part he cannot require performance of the other. A declaration in an action upon such a contract which does not aver performance of precedent conditions, or

<sup>1</sup> See vol. 1, § 168 *et seq.*

a readiness to perform concurrent stipulations, fails to state a cause of action; it does not show that the consideration of the defendant's promise has been kept good.<sup>1</sup> If a note be sued on, the consideration of which was a contract of the payee to perform precedent or concurrent stipulations, and they have not been performed, and the plaintiff in respect to them is in default, these facts may be alleged as a defense. Such a defense is a failure of consideration, and may be total or partial.<sup>2</sup> It does not rest on rescission of the contract, nor is it recoupment.<sup>3</sup>

In the case of independent stipulations the contract has a valid inception, and is sustained on the principle that one stipulation is a consideration for another. Where the contract provides for some act to be done on one side in return for some subsequent act to be done on the other, the doing of the first act is a condition precedent, and the agreement to perform it is independent, and the consideration is the promise of the other party to perform the subsequent act. The consideration of the promise to perform such subsequent act is the performance, not the promise to perform the precedent condition. Where a promise is the consideration, if it is in binding form and made by a competent party, there is no want of consideration; and if its obligation is not afterwards impaired, there is no failure thereof. By the strict common law a party bound by independent stipulations, those based on a promise as a consideration as distinguished from its performance, is bound to perform according to the tenor of his undertaking; that undertaking is enforced for all that it imports, without regard to the ability of the other party [124] subsequently to perform his promise which was the consideration.<sup>4</sup>

<sup>1</sup> Hall v. Perkins, 5 Ill. 548; Buckmaster v. Grundy, 2 id. 310; Washington v. Ogden, 1 Black, 450; Lawrence v. Griswold, 30 Mich. 410; Rogers v. Cody, 8 Cal. 324; Dicken v. Morgan, 54 Iowa, 684.

<sup>2</sup> Tyler v. Young, 3 Ill. 444; Goodwin v. Nickerson, 51 Cal. 166; Wells v. Hopkins, 5 M. & W. 7; Lawrence

v. Griswold, 30 Mich. 410; Coppock v. Burkhart, 4 Blackf. 220; Rogers v. Cody, 8 Cal. 324. But see Waterhouse v. Kendall, 11 Cush. 128.

<sup>3</sup> Thompson v. Richards, 14 Mich. 172.

<sup>4</sup> Foster v. Jared, 12 Ill. 451; Read v. Cummings, 2 Me. 82.



§ 547. **Same subject.** Where A. sold his business as a dentist in a specified place to B., who gave his note for the agreed price, receiving from A. a bond conditioned that he would not practice as a dentist in that place, and a suit was brought on the note after a part had been paid, it was held that the defense of a part failure of consideration, by reason of A. failing to perform the condition of the bond, was inadmissible. The court say: "A part of this consideration he received at the time; all that could be received or enjoyed, and for what was to be done in the future, he received the contract, . . . as contained in and secured by said bond. This was evidently the consideration he received for which he agreed to pay the three thousand dollars, for which the note was given, and all this consideration he received; he got all that he bargained for. But taking it as stated in the plea, that the bond was the consideration for the note, then there was no want of consideration, for the plea alleges that the bond was that consideration, and that it was received according to the agreement of the parties. There was then no want of consideration, either total or partial. Has there been any *failure* of this consideration? Has the bond which was the sole consideration for this note failed in any way? Is it not as valid a security now as at first? Has it proved to be of no binding force or effect? Has it become a void instrument since it was made? If it had been void from the beginning, then there might have been a *want* of consideration. If it has become void since it was made, so as to be no longer of any force or effect as a security, then the consideration has *failed*. But it is not claimed that such is the fact. The bond, which is admitted to have been the consideration for which the defendant . . . agreed to pay three thousand dollars, and which was received just according to agreement, and which was a good and sufficient consideration for such promise at the time, remains in full force and effect; just as valid and binding now as it was the day it was given. If it was a sufficient consideration then, wherein has it failed to be so now?"<sup>1</sup> But

<sup>1</sup> Clough v. Baker, 48 N. H. 254. Sargent, J., further said: "The distinction between a failure of consideration and such a failure to perform on one side as gives the other party an election to rescind the whole

it was formerly the peculiar function of equity to mitigate the severity of this rule of law where the real consideration, the thing promised, failed.<sup>1</sup> The principles of equity on this subject have, however, been largely incorporated into the common law, although not to the same extent in all jurisdictions. Under various circumstances where parties have bound themselves to conditions precedent, or by independent stipulations, they have been permitted to avoid this contract at law, as they could in equity, by showing that the promise, which was the technical consideration, had ceased to be of any value, because, by some act or default of the promisor, he was unable to perform his promise. This doctrine is pointedly stated by Richardson, C. J., in a case which arose in New Hampshire: "When a promise of the payee is the consideration of a note, and that promise fails altogether, so that the maker of the note loses all the advantage he might have expected to derive from it, and nothing is left to him but a mere right of action for the breach of that promise, we are of opinion that he may waive that right of action, and treat the whole agreement as a nullity, if he so choose, and thus avoid the note. In such a case the substantial inducement which led the [126] maker of the note to enter into the contract having totally failed, justice requires that he should not be held to perform the contract on his part against his will. He may, if he please,

contract, or to enforce it, has not always been made or clearly stated, and some confusion may be found in the authorities. *Tillotson v. Grapes*, 4 N. H. 444, is a case in which such a failure to perform his contract on one side as would authorize the other side to rescind the whole contract is improperly spoken of as a failure of consideration. 2 *Smith's L. Cases*, \*9 and 10, in note to *Cutler v. Powell*, and cases cited; *Dodge v. McClintock*, 47 N. H. 383, and cases cited; *Wallace v. Antrim Shovel Co.*, 44 N. H. 521; *Campbell v. Jones*, 6 T. R. 570."

By a written agreement between A. and B. the former agreed that B.

should have leave to cut timber and wood on his land, and B. agreed that A. should have leave to flow his land by means of a dam to a certain extent. They were treated as independent agreements, and it was considered that either might not only have his action for a breach of the contract in his favor, without regard to his performance of his contract to the other party, but that either in such a case might revoke his license at his option, whether the other party did or not, provided the license is on other grounds revocable. *Dodge v. McClintock*, 47 N. H. 383.

<sup>1</sup> *Morgan v. Smith*, 11 Ill. 194.

perform the contract on his part, and resort to an action for the breach of the contract on the other side; but he is not compelled to do this. These principles we consider as well settled by authority.”<sup>1</sup>

§ 548. **Same subject.** In a case in Illinois a note was given for the purchase-money of land; it was payable a month earlier than the contract required the vendor to make a conveyance. The action upon the note, however, was delayed until after the time appointed for conveyance. The vendor had no title to the land when the contract was made, and had none when the day arrived for performing it. Although payment of the purchase-money was a condition precedent, yet, as the vendor had no power to convey, and had neglected to obtain title, the consideration of the note was deemed to have entirely failed. Scates, J., says: “I should by no means regard it as want or failure of consideration that the covenantor had no title at the time of making the covenant, or at the time of the performance of a condition precedent by the other party, for peradventure he may obtain the title by or before the day of conveyance. The difficulty is in the proof, and not in the applicability of the defense. The old doctrine, holding a promise to be a consideration of a promise, should only be applied where no other consideration can be found available to sustain the agreement of the parties. Here we find another, a better, and a surer one. We reach the same goal by a shorter route. If the parties are unable to sustain their contract by the performance of the consideration, we allow them to rescind it at once, and without delay, and thus save the circuity of action and costs occasioned by allowing the plaintiff to recover the money on the note, and the defendant to recover it back upon the breach of covenant. By the delay in bringing this action the defendants are enabled to prove their defense by showing the inability of the obligors to assure the estate; and it seems to me to savor more of [127] technicality, harshness, nay, injustice, than of reason or equity, to say to them, because you agreed to pay a month before you were entitled to a conveyance, that you must now pay the money, and sue upon the covenant, although you are ready and able to show that the covenantors are not able to

<sup>1</sup> Tillotson v. Grapes, 4 N. H. 444.

convey the estate which they agreed to convey.”<sup>1</sup> In another case in that state, a plea of failure of consideration of a note averred that the payee was to plant a hedge for the maker which should become a complete protection against stock in from three to five years; that the note in question was given for moneys payable for such hedge at the time of planting; that the plants set out were winter-killed and useless, never having grown; and that it was then out of the power of the payee to make the hedge according to the agreement. Although the money for which the note was given was due at the time of planting the hedge, and the note made payable one day after date, and the hedge was not to be completed until from “three to five years,” it was held that the consideration had failed, a demurrer to the plea being taken as an admission of the statement that it was then out of the [128] power of the payee to perform the agreement within the stipulated time.<sup>2</sup>

<sup>1</sup>Gregory v. Scott, 5 Ill. 392. See Lull v. Stone, 37 Ill. 224; Davis v. McVickers, 11 Ill. 327; Owings v. Thompson, 4 Ill. 502; Deal v. Dodge, 26 Ill. 458; Tyler v. Young, 3 Ill. 444. The statute referred to in the foregoing cases does not define a failure of consideration. It provides that: “In any action commenced, or which may hereafter be commenced, in any court of law in this state, upon any note, bond, bill, or other instrument in writing for the payment of money, or property, or the performance of covenants or conditions, by the obligee or payee thereof, if such note, bond, bill, or instrument in writing was entered into without a good and valuable consideration; or, if the consideration upon which said note, bond, bill, or instrument in writing was made or entered into, has wholly or in part failed, it shall be lawful for the defendant or defendants, etc., to plead such want of consideration, or that the consideration has wholly or in part failed, etc.; and if it shall appear that the consideration has

failed in part, the plaintiff shall recover according to the equity of the case.” Scates’ Comp. Stats., ch. 73, p. 292. Under this statute it was held that in an action upon a promissory note given for the purchase-money of land, deeded with a covenant against incumbrances, money paid to extinguish an incumbrance should be deducted. Breese, J., said: “A part of the consideration of the note sued on was that the land sold was free from incumbrance. . . . To the extent, then, of this incumbrance, there was a failure of consideration. Morgan v. Smith, 11 Ill. 199; Whisler v. Hicks, 5 Blackf. 100; Smith v. Ackerman, id. 541; Buell v. Tate, 7 id. 55; Pomeroy v. Burnett, 8 id. 142.”

<sup>2</sup>Edwards v. Pyle, 23 Ill. 354; Morgan v. Smith, 11 Ill. 194; Schuchmann v. Knoebel, 27 Ill. 175; Tillotson v. Grapes, 4 N. H. 444; Litchfield v. Allen, 7 Ala. 779; Stone v. Fowle, 22 Pick. 166. But see Read v. Cummings, 2 Me. 82; Thompson v. Warren, 5 Cold. 644.



The defense of a failure of consideration in such cases rests on the principle of a rescission of the contract. The defendant who has relieved himself from the performance of a condition precedent or any independent stipulation on the ground that the promise which was its consideration has altogether failed cannot afterwards claim damages for such failure. He has not himself performed, but has been absolved from furnishing the consideration on his part. A sale fills the definition of a valid contract, where there is delivered or sold at a given price a tangible property, or existing subject of any kind, with warranty, and which must possess value if the warranty be true. The contract for the purchase-money is a valid consideration on one side, and the undertaking which the warranty imports is a consideration on the other. The warranty of title against defect, or of qualities, is a contract for the present existence of facts. The acceptance of the property so warranted is no admission of the truth of the warranty; but where delivery and payment are to be simultaneous acts the warranty is generally relied on as the consideration for the price agreed to be paid. The money is parted with on the faith of the warranties — that is, that they are true, not that the purchaser will have only his remedy for damages. Such title as the vendor has is at once vested in the purchaser, and the property is taken absolutely. If the warranties are not true, they are broken at the time of the sale, but the fact is then undecided; they are to be verified or shown to be false by some future test. The same may be said of a sale where a note is given for the price payable at a future day. Payment of the price is not a legal waiver of a warranty; though it may have some weight as an evidentiary fact to negative the breach thereof. If, however, before the price is paid upon an executed sale the fact can be established that the warranty was untrue, by the later and better authorities it may be shown either as an unliquidated partial failure of consideration, or as a cross-claim, the damages upon which may be set off by recoupment. In England, where the action is brought on the original contract, fraud or breach of warranty in a sale, or failure of the plaintiff to perform his part of the agreement, may also be proved in reduction of damages. The sum to be recovered for the price

of the article may be reduced by so much as the article is diminished in value by reason of the fraud or non-compliance with the warranty.<sup>1</sup>

§ 549. **Consideration fraudulent or illegal in part.** Fraud is a private wrong, and any entire contract into which it enters may be avoided *in toto* by the party against whom it was practiced.<sup>2</sup> If not avoided for the fraud, and the injury therefrom only goes to part of the consideration, the note may be avoided *pro tanto*, as for partial failure of consideration.<sup>3</sup> If the maker would repudiate the contract entirely for the fraud he must return the consideration, unless it is wholly without value;<sup>4</sup> but without doing this he may have a deduction to the extent that the subject-matter is diminished in value by reason of the fraud, wherever a part failure of consideration is allowed as a defense.<sup>5</sup> But in England, where partial failure of consideration is not allowed as a defense to a note, it was held no defense in an action by the indorser against the acceptor that the latter had been imposed on in respect to the contract by the drawer, on account of which the acceptance was given, and that the plaintiff was privy to such imposition, where the acceptor did not wholly repudiate the transaction on discovering the imposition, but still retained possession of the premises under such contract, as the consideration [130] had not altogether failed, so as to render the bill wholly void.<sup>6</sup> Where a note is given for several distinct items or considerations, one of which is afterwards discovered by the

<sup>1</sup> Lewis v. Cosgrave, 2 Taunt. 2; Street v. Blay, 2 B. & Ad. 456, as explained in Mondel v. Steel, 8 M. & W. 858, 870.

<sup>2</sup> Coburn v. Haley, 57 Me. 316; Wyman v. Heald, 17 Me. 329; Robinson v. Heard, 15 Me. 296; Lewis v. Cosgrave, 2 Taunt. 2; Solomon v. Turner, 1 Stark. 51; Nicewanger v. Bevard, 17 Ind. 621; Rose v. Wallace, 11 id. 112; Davis v. Jackson, 22 id. 233; Rodman v. Williams, 4 Blackf. 70; Cowger v. Gordon, id. 110; James v. Lawrenceburgh Ins. Co., 6 id. 525; Doughty v. Savage, 28 Conn. 146.

<sup>3</sup> Bischof v. Lucas, 6 Ind. 26; Stevens v. McIntire, 14 Me. 14.

<sup>4</sup> See Reeves v. Kelly, 30 Mich. 132.

<sup>5</sup> Bischof v. Lucas, 6 Ind. 26; Coburn v. Ware, 30 Me. 202; Hammatt v. Emerson, 27 Me. 308. See Sternburg v. Bowman, 103 Mass. 325.

<sup>6</sup> Archer v. Bamford, 3 Stark. 175; 1 C. & P. 64. See Solomon v. Turner, 1 Stark. 51.

But if the action were brought on the original contract for the price the rule laid down in De Sewhanberg v. Buchanan, 5 C. & P. 343, would be applied. Lorn v. Tucker, 4 C. & P. 15.

maker to be fraudulent, or where one item not chargeable to him is stealthily included therein without his knowledge, the note is not wholly void or voidable, but only to the extent of the fraudulent item.<sup>1</sup>

In a case in Ohio<sup>2</sup> a member of a firm after dissolution, without authority from his copartners, renewed firm notes by giving a new note in the firm name. The new note, without any intent to defraud, was made to bear interest at ten per cent., and to include the individual note of one of the partners. The defendant, a member of the firm, supposing the new note was simply a renewal of the firm notes at six per cent., promised to pay it. It was held that such new note was binding on him for the amount of the firm note surrendered on the renewal, with simple interest from that time.<sup>3</sup> So in a Mississippi case it was stated in a plea to an action upon a note against a surety that he and another, before a sale by administrators, informed them that they would become the sureties of one K. for any amount of property he might buy at the sale. He purchased to the amount of \$1,138.45. Afterwards, and before the execution of the note in suit, K. became indebted to the administrators otherwise than for property bought at such sale in the further sum of \$400. The administrators included this sum also in the note and presented it, signed by K., to the defendant, and fraudulently and knowingly held the same out to him as for that sole consideration. The defendant being misled, and supposing that the note embraced only the amount of K.'s purchase at the sale, signed it. [131] It was held that the note was not voidable *in toto*, but only to the amount of the excess.<sup>4</sup> Where the fraud, however, is committed in procuring the execution of the note, as by misreading it to an illiterate person, or substituting another for the one read, the note is wholly voidable.<sup>5</sup>

**§ 550. Same subject.** Where part of the consideration of a note was illegal no apportionment can be made; the whole

<sup>1</sup> Griffiths v. Parry, 16 Wis. 218; Haycock v. Rand, 5 Cush. 26; Deering v. Chapman, 22 Me. 48; Brown v. North, 21 Mo. 528; Wade v. Scott, 7 id. 509; Andrews v. Wheaton, 23 Conn. 112.

<sup>2</sup> Wilson v. Forder, 20 Ohio St. 89.

<sup>3</sup> See Gamble v. Grimes, 2 Ind. 392.

<sup>4</sup> Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213.

<sup>5</sup> Stacy v. Ross, 27 Tex. 3; Griffiths v. Kellogg, 39 Wis. 290.

note is void. The principle that no court shall aid men who found their cause of action upon illegal acts is not only well settled but is most salutary. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice; that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain.<sup>1</sup> Thus, if a note be given for the price of articles sold, and a sale of a part of them was unlawful, the note is not valid for any part.<sup>2</sup> If part of the consideration of a note be an agreement to discontinue a criminal prosecution, or to refrain from commencing one;<sup>3</sup> or to do an act which would be a violation of official duty;<sup>4</sup> or to indemnify against any unlawful act, as where a premium is to be given for insurance on a cargo, the exportation of a part of which is prohibited by law,<sup>5</sup> the note is wholly void; being an illegal contract, it is not divisible.<sup>6</sup>

<sup>1</sup> *Roby v. West*, 4 N. H. 285; *Booth v. Hodgson*, 6 T. R. 405; *Card v. Hope*, 2 B. & C. 661; *Holland v. Hall*, 1 B. & Ald. 53; *Shaw v. Spooner*, 9 N. H. 197; *Clark v. Ricker*, 14 N. H. 44; *Brigham v. Potter*, 14 Gray, 522; *Sternburg v. Bowman*, 103 Mass. 325.

<sup>2</sup> *Carlton v. Bailey*, 27 N. H. 230; *Kidder v. Blake*, 45 N. H. 530; *Carlton v. Whitcher*, 5 N. H. 196; *Coburn v. Odell*, 30 N. H. 540; *Deering v. Chapman*, 22 Me. 488; *Bliss v. Brainard*, 41 N. H. 261; *Greenough v. Balch*, 7 Me. 461; *Hanauer v. Doane*, 12 Wall. 342; *Gray v. Hook*, 4 N. Y. 449; *Gammon v. Plaisted*, 51 N. H. 444; *Roby v. West*, 4 id. 285; *Perkins v. Cummings*, 2 Gray, 258; *Braith v. Guelick*, 37 Iowa, 212; *Gaitskill v. Greathead*, 1 Dow. & Ry. 359; *Scott v. Gilmore*, 3 Taunt. 226; *Snyder v. Willey*, 33 Mich. 495; *Trist v. Child*, 21 Wall. 441.

<sup>3</sup> *Shaw v. Spooner*, 9 N. H. 199; *Hinds v. Chamberlin*, 6 id. 225.

<sup>4</sup> *Waite v. Jones*, 1 Bing. N. C. 656.

<sup>5</sup> *Parkin v. Dick*, 11 East, 502.

<sup>6</sup> *Widoe v. Webb*, 20 Ohio St. 431.

Where, however, an entire stock of

goods is sold at one and the same time, but each article for a separate and distinct agreed value, the contract is not to be regarded as entire and indivisible; and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other articles illegal also. *Carleton v. Woods*, 28 N. H. 290. The action was brought upon notes given for the whole purchase, and also for goods sold and delivered. The promise embraced in the notes was held entire, and part of the consideration being illegal, the notes were void; but it was held otherwise as to counts for goods sold and delivered. *Woods, J.*: "The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract each article was separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was in effect a contract to pay for each article a price to be determined in the manner before stated.



[132] In a case in Ohio <sup>1</sup> Scott, C. J., said: "The concurrent doctrine of the text-books on the subject of contracts is, that if one of two considerations of a promise be *void* merely, the other will support the promise; but, that if one of two con-  
[133] siderations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts part of which are unlawful;

The consideration for the promise to pay for the goods is not to be regarded as one and indivisible. The sale and delivery of each article formed the consideration in this case for the promise to pay the price for it. The contract was divisible. The fact that the whole stock was sold at the same time can make no difference. The terms of the agreement are to be looked at in determining its character. It was not a case of a sale of an entire stock of goods for an entire price for the whole, without reference to the value of the separate articles sold. Instead of that, there was in fact a particular sum agreed to be paid for each article sold. This, we think, was the legal effect of the contract. And while the separate values of the articles sold can be ascertained, as fixed by the parties, the principle is not readily seen which would defeat the right of recovery for the stipulated price of that portion the sale of which was legal. Under a count like the present, less may be recovered than is declared for. A recovery may be had for a part although the claim may be defeated in part. . . . The contract for the goods sold in this case,

then, not being entire, but divisible, and the prices of the several articles being agreed by the parties, and readily ascertainable, we are of opinion that the plaintiff is entitled to recover, under the count for goods sold and delivered, the agreed price of the goods sold, excepting the spirituous liquors. There is a distinction between a case in which one or an entire promise, as a note, is made upon a consideration, a part of which is illegal, and a case where for an entirely good consideration several distinct things are granted or contracted to be done, one of which is unlawful. In the former case, the promise is wholly void; in the latter, the grant or promise, so far as legal, may be upheld. *Doe v. Pitcher*, 6 Taunt. 358; *Kerrison v. Cole*, 8 East, 231; *Mouys v. Leake*, 8 T. R. 411; *Leavitt v. Palmer*, 3 N. Y. 19, 37; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 id. 440; *Gaskell v. King*, 11 id. 165. See *Greenwood v. Bishop of London*, 5 Taunt. 727; *United States v. Bradley*, 10 Pet. 343; *Hyslop v. Clarke*, 14 Johns. 458; *Mackie v. Caines*, 5 Cow. 547."

<sup>1</sup> *Widoe v. Webb*, 20 Ohio St. 431.

because the whole consideration is the basis of the whole promise. The parts are inseparable.<sup>1</sup> Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy."<sup>2</sup> It has also been held that where a contract is void for illegality, the subsequent repeal of the law which rendered it illegal will not relieve it of the objection.<sup>3</sup> Nor will a seal protect from inquiry into the legality of the consideration.<sup>4</sup> If partial payments are made upon a note of which an ascertainable portion of the consideration is illegal, and to a greater amount than that part of the consideration, the creditor, in the absence of a special appropriation of such payment by the debtor, is not at liberty to apply the same in satisfaction of the illegal part of the debt.<sup>5</sup>

<sup>1</sup> Metcalf on Cont. 246; Addison on Cont. 456; Chitty on Cont. 730; 1 Parsons on Cont. 456; 1 Parsons on Notes & Bills, 217; Story on Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94.

<sup>2</sup> And see comments in the same opinion on the case of Doty v. Knox Co. Bank, 16 Ohio St. 133.

<sup>3</sup> Roby v. West, 4 N. H. 285; Jaques v. Withy, 1 H. Bl. 65; Gorsuth v. Butterfield, 2 Wis. 237.

<sup>4</sup> Gray v. Hook, 4 N. Y. 449; Collins v. Blantern, 2 Wils. 347; Livingston v. Tremper, 4 Johns. 416; Tuxbury v. Miller, 19 id. 311.

<sup>5</sup> Gammon v. Plaisted, 51 N. H. 444; Caldwell v. Wentworth, 14 id. 431; Hall v. Clement, 41 id. 166; Hilton v. Burley, 2 id. 193; Warren v. Chapman, 105 Mass. 87; Haynes v. Nice, 100 id. 27; Rohan v. Hanson, 11 Cush. 44. See Deering v. Chapman, 22 Me. 488; Maybin v. Coulon, 4 Dall. 298.

In Greenough v. Balch, 7 Me. 461, there was an account between the parties of several transactions, a part of which were legal and a part illegal. After the last illegal transac-

tion a payment was made on the account, which was considerably more in amount than the sum of both legal and illegal debits at that time; this payment was credited, but the account remained open, and all the succeeding debit items were lawful. It was held that a note given for a balance subsequently accruing was not affected by the illegal items, for the new balance was deemed to arise from lawful charges; that the accounts being kept in continuation did not alter the case; the illegal items had been voluntarily paid, and such payment could not be recovered.

In Brisbane v. Pratt, 4 Denio, 63, the action being in the name of an indorsee of a note, which note was received after it became due, in the absence of any proof that he paid value for it, held, that there is a presumption that the action is brought for the benefit of the former holder, and his declarations made while he held the note, and after it became payable, that it was given for an illegal consideration, are admissible for the defendant.

[134] § 551. **Defect of consideration shown by parol evidence.** The question how far a different bargain from that stated in the bill or note may be proved by parol evidence to establish a defect of consideration has been much discussed, and has elicited considerable contrariety of opinion. It is an undoubted rule of the common law that parol contemporaneous evidence shall not be received to vary or contradict a written contract.<sup>1</sup> This rule, however, does not preclude proof between proper parties to negative the presumption which the law raises that a note or bill is founded on a valuable consideration. Nor does it stand in the way of parol evidence to contradict an express and even specific admission in the paper of a consideration. It may be shown that there was no consideration, or a different one.<sup>2</sup> Nor does it exclude proof that the note or bill was given for accommodation when it is sued on by the accommodated party;<sup>3</sup> or that it was given for indemnity with a view to limiting recovery to the amount of the loss in [135] demmified against,<sup>4</sup> or for future advances, and with a view to limiting recovery to the amount advanced.<sup>5</sup>

<sup>1</sup> 1 Greenlf. Ev., § 275; *Adams v. Wordley*, 1 M. & W. 374; *Barnstable Savings Bank v. Ballou*, 119 Mass. 487; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Conner v. Clark*, 12 Cal. 168; *Stackpole v. Arnold*, 11 Mass. 27; *Hoare v. Graham*, 3 Camp. 57; *Hunt v. Adams*, 7 Mass. 518; *Wells v. Baldwin*, 18 Johns. 45; *Fitzhugh v. Runyon*, 8 id. 375; id. 189; *Warren Academy v. Starrett*, 15 Me. 443; *Harlow v. Boswell*, 15 Ill. 56; *Lane v. Sharpe*, 4 Ill. 566; *McCarthy v. Howell*, 2 Ill. 341; *Abrams v. Pomeroy*, 13 Ill. 133; *Mager v. Hutchinson*, 7 Ill. 269.

<sup>2</sup> *Pollen v. James*, 45 Miss. 129; *Folsom v. Mussey*, 8 Me. 400; *Abbott v. Hendricks*, 1 M. & G. 791; *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *French v. Gordon*, 10 Kan. 370; *Cragin v. Fowler*, 34 Vt. 326; *Aultman v. Mason*, 83 Ga. 212, 218, quoting the text.

<sup>3</sup> *King v. Phillips*, 12 M. & W. 705;

*Thompson v. Clubley*, 1 id. 212; *Violett v. Patton*, 5 Cranch, 142; *Moore v. Cross*, 17 How. Pr. 385; *Fant v. Miller*, 17 Gratt. 47; *Robertson v. Williams*, 5 Munf. 381.

<sup>4</sup> *Haseltine v. Guild*, 11 N. H. 390; *Gilbert v. Duncan*, 29 N. J. L. 133; *Colman v. Post*, 10 Mich. 422; *Bowker v. Johnson*, 17 id. 42. See *Homan v. Thompson*, 6 C. & P. 717.

<sup>5</sup> *Lawrence v. Tucker*, 23 How. (U. S.) 15; *Collins v. Carlisle*, 13 Ill. 254.

In *Bowker v. Johnson*, 17 Mich. 42, Judge Campbell says: "When a mortgage accompanies a note or bond it is a mere incident to the principal security, and the note or bond is the substantial evidence of debt. Yet it has always been held that it might be shown that the whole transaction, appearing on its face to be unconditional, was a security for something else, and no enforcement has been allowed for any other pur-

Accommodation paper is made in contemplation of a [136] consideration to be received by the accommodated party; until that consideration accrues the paper has no validity; when it has arisen the paper is good within its nominal amount to the

pose than the actual one. The statute of frauds does not prevent trusts in personalty from being evidenced by parol, and a trust is therefore admitted to be shown against all but *bona fide* holders, whether it be to create a special interest, a defeasance, or any other similar equity. See *Catlin v. Birchard*, 13 Mich. 110. This doctrine has been applied in various ways. It has been allowed to convert an absolute deed into a mortgage. *Wadsworth v. Loranger*, Harr. Ch. 113; *Emerson v. Atwater*, 7 Mich. 12. To turn a contract of sale into a mortgage. *Batty v. Snook*, 5 Mich. 231; *Swetland v. Swetland*, 3 id. 482. To show that the original mortgagee had no interest in the securities. *Bishop v. Felch*, 7 Mich. 371. To show that a negotiable note secured by mortgage was really given for indemnity. *Colman v. Post*, 10 Mich. 422. To show that a bond and mortgage for a fixed sum was given in consideration of a promised loan and a promised conveyance of property, and that there had not been a complete compliance with the promises. *Robinson v. Cromelien*, 15 Mich. 316. In *Bennett v. Beidler*, 16 Mich. 150, a note was given for a sum of money, which was the price of the crops on certain lands purchased at auction at an estimated number of acres, with an agreement that the maker of the note might have a subsequent measurement made to ascertain the true amount of the purchase-money. The note having been paid by the maker to a *bona fide* holder, and the land falling short, he was held entitled to recover back the surplus payment." The case under consideration was an

action upon a promissory note for \$1,000. Upon the trial it appeared in evidence that this note, with another of like amount, was given under the following circumstances: defendant bought out B.'s interest as partner in a brewery, and was to pay \$3,000, one-third cash and the balance by these two notes; and was to assume and pay in full all of B.'s share in the debts of the firm, in which defendant succeeded him, and indemnify him against all liability and damages. B. showed a schedule of debts and assets as a basis of this arrangement, and it was agreed that if defendant paid debts beyond what appeared on the schedule, he should be entitled to a corresponding deduction on the notes, which were to be left in bank to stand for that purpose. The defendant gave an unqualified bond to pay and indemnify, and executed the notes. One of the notes was indorsed by B. to a *bona fide* holder. Defendant paid claims in excess of the schedule list, of which B.'s half amounted to \$1,459.20. And referring to the case in hand the learned judge continued: "We can perceive no difference in principle between these cases. J. undertook absolutely to pay the debts of B., whatever might be their amount, and did pay them. But the price payable by J. was fixed upon the basis that such debts should be taken at a specified sum, and, if exceeding that, should entitle him to a corresponding reduction. So far as they were in excess they reduced the consideration for his notes; and being capable of pecuniary calculation, and not in the nature of unliquidated damages,



extent that upon such consideration the accommodated party could incur a personal obligation. When commercial paper is given to cover a loss which is contingently incurred on the faith of it, or to recover future advances which the receiver of the paper either binds himself or has an option to make, the payee holds it upon a legal consideration from the beginning; but until the loss happens in the one case, or advances are made in the other, the promise of payment between the immediate parties is dormant. A note given for the premium of insurance on taking out an open marine policy is of this character; it becomes operative and valid only as fast as risks are assumed on the policy, and to the extent of the premiums thereby earned.<sup>1</sup> Hence, the real consideration may be contingent, conditional or defeasible, and it may be shown by parol to be so; that it had not arisen, or, if it potentially existed at first, that it afterwards became nugatory so as not to support the promise to pay.

**§ 552. Same subject.** The consideration being open to inquiry so far as the promise to pay depends upon its existence, [137] continuance or amount, such promise may be indirectly varied and controlled by parol evidence; not by showing that a different promise from the written one was made, but that it is different in legal effect as a consequence of a want, cessation or shrinkage of the consideration;—by evidence that the consideration implied had no existence; that it did not continue, or was, or has become, deficient in amount. The promise may thus be altogether undermined, postponed, or reduced. A different agreement cannot be shown from that expressed in the note. A parol agreement contemporaneous with the making of a note by two that one of them shall be liable only in the event that it cannot be collected of the other;<sup>2</sup> that a note payable on demand shall not be de-

stand on the same footing as if he had given an accommodation note, or a note for money, in excess of a money price fixed at the time. The debts were all in existence at the date of the transaction, and when ascertained and paid reduced to that extent the value received by J. of B. The agreement rendered it the duty of B. to hold the notes as security for

no greater sum than was equitably due, and had he retained them both they would have been enforceable for no more."

<sup>1</sup> *Furniss v. Gilchrist*, 1 Sandf. 53; *Maine Mut. M. Ins. Co. v. Stockwell*, 67 Me. 382; *Elwell v. Crocker*, 4 Bosw. 22.

<sup>2</sup> *Mager v. Hutchinson*, 7 Ill. 266. See *Pike v. Street*, M. & M. 226.

manded until after the maker's death;<sup>1</sup> that the note shall be void if a suit be compromised;<sup>2</sup> or if a verdict be obtained in an action between other parties,<sup>3</sup> is not admissible. So a note given for the right to vend a patented article in a particular county, payable at a certain time, cannot be affected by parol evidence that when it was executed it was verbally agreed that it should not be due and payable until sales to a specific amount had been made.<sup>4</sup> And an absolute note for purchase-money of land for which a quitclaim is to be executed is not subject to be defeated by proof of a contemporaneous parol agreement that if the land should be redeemed the note should be void.<sup>5</sup> Nor can a parol condition be proved in an action on such a note that it is to be void if other interests in the same land cannot be purchased in a particular manner.<sup>6</sup> The terms of a note or other written contract cannot be varied by evidence which goes simply to the fact that a different promise to pay was made by the defendant from that reduced to writing.<sup>7</sup>

An instrument not under seal may be delivered upon [138] conditions the observance of which, as between the parties, is essential to its validity; and the annexing thereof to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it or others having notice.<sup>8</sup> While parol evidence is not admissible to vary the effect of an undertaking, or merely to show that it was to be renewed, yet where the note does not contain the whole contract in pursuance of which it was made, it is competent to show what that contract was and the purpose for which it was made.<sup>9</sup> But this is only competent to show that

<sup>1</sup> *Graves v. Clark*, 6 Blackf. 183; *Woodbridge v. Spooner*, 3 B. & Ald. 233.

<sup>2</sup> *Dale v. Pope*, 4 Litt. 166.

<sup>3</sup> *Foster v. Jolly*, 1 Cr., M. & R. 703.

<sup>4</sup> *Harlow v. Boswell*, 17 Ill. 56.

<sup>5</sup> *Lane v. Sharpe*, 4 Ill. 566.

<sup>6</sup> *Ely v. Kilborn*, 5 Denio, 514.

<sup>7</sup> *Erwin v. Saunders*, 1 Cow. 249; *Underwood v. Simonds*, 12 Met. 275; *Adams v. Wilson*, id. 138; *St. Louis Perpetual Ins. Co. v. Honer*, 9 id. 39; *Holzworth v. Koch*, 26 Ohio St. 33;

*Bookstaver v. Jayne*, 60 N. Y. 146; *Moseley v. Hanford*, 10 B. & C. 729; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordley*, 1 M. & W. 374; *Conner v. Clark*, 12 Cal. 168; *Mahan v. Sherman*, 7 Blackf. 378; *State v. Overturf*, 16 Ind. 261.

<sup>8</sup> *Benton v. Martin*, 52 N. Y. 570.

<sup>9</sup> *Bookstaver v. Jayne*, 60 N. Y. 146. The answer of defendant J., to an action upon a promissory note, stated that defendant G., who was a mer-

the note has been diverted from its original purpose, or to prove a defect of consideration.<sup>1</sup>

A plea to an action on a note payable one day after date stated that a certain specified part of the sum therein mentioned was included in consideration that suit should not be brought on the note for sixty days; and the suit being brought within that time, it was claimed that there was a partial failure of consideration. On demurrer this plea was held good. Proof of such facts would vary the legal effect of the note, [139] but it does so consequentially by explaining the consideration.<sup>2</sup>

chant doing business, was indebted to the plaintiff in the sum of about \$5,000; that an action had been commenced to recover the same; that, to induce defendant to become an indorser, plaintiffs promised that if J. would indorse G.'s note for \$4,000, at three months, they would discontinue said action and give at least one renewal of the note; that, relying upon said agreement, defendant indorsed the note in suit; that plaintiffs did not perform their agreement, but, on the contrary, entered up judgment in said action, issued execution and levied upon said G.'s stock of goods, and thereby destroyed his credit and caused him to fail in business, and deprived said G. of the opportunity of eventually paying the note and relieving defendant of liability, and did not give a renewal of said note. The defendant claimed that thereby his indorsement became null and void. It was held that the plaintiffs utterly failed to carry out the agreement upon which the notes were indorsed by the defendant, and therefore had no right to enforce their collection. See *Holzworth v. Koch*, 26 Ohio St. 33; *Adams v. Wordley*, 1 M. & W. 374; *Bellows v. Folsom*, 2 Robt. 138.

<sup>1</sup> Id.

<sup>2</sup> *Hill v. Enders*, 19 Ill. 163; *Mor-*

*gan v. Fallenstein*, 27 id. 31. Caton, C. J., said in the case last cited: "It may be that, strictly speaking, the agreement to pay the money mentioned in the note at the time there stated, and the agreement not to enforce the payment of that amount till after the 1st of June, 1861, all being made at the same time, constituted but one agreement, only that part of it which is embodied in the note being reduced to writing, the rest being allowed to rest in parol, and that by the general rule of law this latter part, which was not embraced in the writing, could not be shown by parol. If that rule is to be applied in this case, then it must in all similar cases; and it would be impossible in any case to show a total or partial failure of consideration of a note by parol, for the consideration of a note must necessarily form part of the agreement in pursuance of which the note is given; that part of the agreement which constitutes the consideration is never reduced to writing, and it must be shown by parol if it is ever shown. If I agree with you to deliver you my horse tomorrow, and you give me your note for \$100 in consideration thereof, here only part of the agreement is reduced to writing by the execution and delivery of the note, and that

It may be shown in defense to an action upon a note which expresses that it is given for a lease that a part of the consideration was the good will of an insurance business and an insurance list, and that this part has been withheld.<sup>1</sup> So where the maker and payee of a note were owners of certain lands, and the maker took a conveyance to sell them on joint account, and as security to make prompt payment of the purchase-money, after the lands should be sold, made the note in question, these facts were deemed admissible; and it appearing that the lands remained unsold, there was held to be a want of consideration.<sup>2</sup> It is to be observed that a note given under such circumstances and for such a purpose is not void for want of consideration. It is valid as a security for the fulfillment of a trust. The transfer of the title to the maker was a consideration. Parol evidence being admissible even at law to show the fiduciary character of the transfer, it was permitted to have effect to restrain accordingly the written promise to pay; for upon the real consideration there was no equitable duty to pay until a sale had been made. In view of the trust there was no consideration for payment until that event — and this defense was a legal one. Caton, C. J., said:

portion which requires me to deliver the horse to-morrow is left in parol. Shall it be said that when I refuse to deliver the horse I may turn round and say you shall never prove it because that portion of the agreement was not put into the writing? The truth is that even the common law made an exception to that rule of evidence in cases where notes or other instruments for the absolute payment of money are given. It has always been admissible to show by parol the consideration upon which such instruments were executed. But whatever may have been the rule of the common law, our statute has expressly provided for this defense; and necessarily, to give effect to the statute, parol evidence must be admitted to show what the contract was, as well as to show that the consideration has failed. The statute

has made no exception, and we can make none. A note or bond to pay money is necessarily but a part of the agreement between the parties, leaving out as it does all that portion of the agreement which induced the undertaking to pay the money; [140] and if this part could not be shown by parol there must ever be a liability to a failure of justice. Nor is the exception to the general rule . . . confined to showing by parol a failure of consideration. Usury, and, in fine, any other defense arising out of the original agreement upon which the note was given, or of which the note constitutes a part, may be shown by parol in order to establish a defense to the note."

<sup>1</sup> Great Western Ins. Co. v. Rees, 29 Ill. 272.

<sup>2</sup> Marsh v. Bennett, 22 Ill. 313.



“He (the plaintiff) might have held it till a consideration had arisen. This he did not choose to do, but brought his action, when in fact no consideration for the promise existed.” It seems difficult to reconcile with this case one decided by the same court in the following year.<sup>1</sup> The opinion was delivered by the same judge, and he states the facts set forth in the notice as a pleading, constituting the alleged defense: “It shows [141] that the several creditors of F. met him by appointment, of whom the plaintiff and defendant were two, and in pursuance of an arrangement then agreed to by all, W. gave his notes for the amounts of the several debts of the creditors present, as an evidence of the amounts due them from F.; that this note is one of those then given for the supposed amount due from F. to S. The notice further shows that it was agreed between all parties that W. was only to pay the several notes then given, as he should collect the debts due F. Now, the notice nowhere states that he has not collected enough to pay all the notes, but it states that afterwards, but how long cannot be learned, the arrangement was broken up by F., with the consent of all parties, and the contract set aside, all the parties interested, including S., consenting thereto. The notice does not show, except by implication, that W. was to be empowered to collect F.’s debts.” Upon this statement the learned judge proceeded to say: “If this notice is to be understood as stating that it was the agreement that W. should collect F.’s debts, and pay the proceeds over *pro rata* in satisfaction of the notes, as fast as he should collect the money, and that he should be liable to pay the notes only as fast as the collections would enable him to do so, it clearly states a fact which the law cannot allow him to prove. This is not an attempt to prove a want or a failure of consideration of the note, but it is an attempt to vary the terms of the note.”<sup>2</sup>

<sup>1</sup> Walters v. Smith, 23 Ill. 342. See Harris v. Harris, 69 Ind. 181; King v. King, id. 467.

<sup>2</sup> The notice of defense which is set out in the report states that the note was given solely upon consideration that F. “would assign over and deliver to the defendant a large

amount of indebtedness due or to become due to him from third persons, and out of the proceeds of which, when collected, the defendant was to pay.” Caton, C. J., said: “The paper says the money should be paid on or before the 25th of December, 1859, absolutely. The offer

§ 553. **Same subject.** In a Mississippi case<sup>1</sup> an ad- [142] ministrator at a sale of his decedent's personal property proclaimed that the slaves about to be sold were subject to judgment liens, and he offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up. The slaves, on that assurance, sold for their full value. In an action brought by the administrator on a note given for the purchase-money, it was held that the makers of it might show under the general issue that the slaves for the price of which the note was given were taken out of their possession and sold under judgments against the estate, and that the consideration of the note had thus failed. The court say the rule of law that parol testimony cannot be heard to vary written agreements has never been carried so far as to defeat the right to prove a failure of consideration.<sup>2</sup> A promise cannot be enforced in full unless the consideration exists and continues intact as the promisee is bound to furnish and maintain it. The consideration of commercial paper may, and usually does, exist in parol; it may be intrinsically or conven-

of parol proof is that he did not agree to pay the money absolutely on that or any other day, but that he only made a conditional promise that he would pay the note if he collected the money, but never without. Our statute allowing the failure or want of consideration of a note to be proved by parol never intended to allow parol proof to change the terms of a note which has been delivered and become operative. The rule that the writing must speak the intention of the parties is as applicable to a note as to any other written instrument. It is, no doubt, competent to show what the note was given for, but that does not alone constitute a defense; but in order to make out a defense it is necessary to show that W. did not at the time promise as the paper says he did. This it was inadmissible to show by parol. What we said in

Lane v. Sharp (3 Seam. 566) is directly applicable to this case, and sufficiently expresses our view of the law on this subject."

In *Great Western Ins. Co. v. Rees*, 29 Ill. 272, the court say: "The ruling of this court in *Lane v. Sharp* and in all subsequent cases founded upon that is to be considered as having no application to a case where no consideration or a total or partial failure of consideration is properly pleaded in an action brought upon an instrument of writing for the payment of money or property or the performance of covenants or conditions to an obligee or payee." See *Mann v. Smyser*, 76 Ill. 365; *Nichols v. Hunton*, 45 N. H. 470.

<sup>1</sup> *Buckels v. Cunningham*, 6 Sm. & M. 358.

<sup>2</sup> *Sumner v. Williams*, 8 Mass. 162; *Shepherd v. Temple*, 3 N. H. 455; *Tillotson v. Grapes*, 4 id. 444.

tionally conditional or contingent; it may be subject to suspense, change or rescission by oral stipulation; its value and duration may be assured or determinable in the same manner, and so that the defendant's promise will also be correspondingly absolute or mutable; be enforceable in full when the consideration is intact, and wholly or in part discharged if it [143] be wanting, or if it fail entirely or partially. The cases already referred to of notes given for a special purpose, as for indemnity, future advances, or as security for other acts than that of paying the precise money mentioned in the instrument, are illustrations of the defeasibleness of such written promises, as well as of the flexible nature and efficiency of the law in maintaining the conventional equipoise of right and obligation between the parties by proof relating to the consideration.

These principles were clearly recognized in an early case in Maine.<sup>1</sup> The defendant was a wharfinger in G., to whom the plaintiff, living in P., had been in the practice of sending various kinds of lumber for sale, which the defendant sometimes sold for cash and sometimes on credit. Whenever he made sales he credited the plaintiff with the amount; it being, however, understood that he was not to be debtor therefor to the plaintiff till he should actually receive the money. On the 10th of June, 1828, he sold to one H. four hundred and seventy-eight dollars' worth of the plaintiff's lumber, taking his negotiable note for that sum, payable to the plaintiff in ninety days; the purchaser then being in good credit and the time comports with the usage in such cases. For the proceeds of this sale, among others, the plaintiff was credited in the defendant's books at the date of the note in suit. The plaintiff, wishing to make arrangements to preserve his property from being sacrificed by his creditors, made a nominal sale to the defendant of all his lumber then on the latter's wharf, for the amount of which, and for the sum credited as above to the plaintiff in the defendant's books, including the amount sold to H., the note in controversy was made; it being then agreed orally between the parties that the defendant should sell the lumber, and collect what was due for lumber already sold, and account to the plaintiff therefor in the same

<sup>1</sup> Folsom v. Mussey, 8 Me. 400.

manner as if no note had been given, and that his liability to the plaintiff should not be changed or affected by giving the note. The plaintiff then indorsed the note of H. to the defendant. Here was a sale in form and legal effect between the parties, though voidable by creditors, of lumber and a note; and the question was whether the note should be [144] enforced for the full amount expressed, or whether the amount collectible thereon should be adjusted according to the eventual value of the consideration under the verbal bargain contemporaneously made. The opinion of the court, by Weston, J., places the judgment upon broad principles which are believed to be sound and in accord with the best authorities of later date. He says: "It is an undoubted rule of the common law that parol testimony shall not be received to vary or contradict a written contract. In support of this principle many cases have been cited. That the defendant did make the contract declared on is not controverted. It is a note of hand which, like a specialty, imports a consideration, and, indeed, acknowledges one. Shall this written acknowledgment be contradicted by parol evidence? The rule upon which the defendant relies, strictly understood, would exclude it. And yet, that such evidence is admissible for this purpose is as well settled as the rule. Between the decisions which illustrate and enforce the rule and those which recognize the exception there may be an apparent discrepancy, but that will generally be found to arise from the different aspects in which they have been viewed. The case of *Barker v. Prentiss*<sup>1</sup> and the opinion of Chief Justice Parsons there given has maintained its ground in practice, although the language used in subsequent opinions . . . appears sometimes to lose sight of the distinctions there made. The position laid down in that case is that in all written simple contracts evidence of the consideration may be received between the original parties. And this is the uniform practice of our courts. If upon this inquiry it results that there was no consideration or that it has failed totally or partially, or that the contract was signed under mistake or misapprehension, the rights of the parties are determined as the justice of the case requires upon a view of all the facts. The plaintiff fails to recover, or he recovers

<sup>1</sup> 6 Mass. 430.



a part only, of what the note or other contract expresses according to equity and good conscience. Of this character was the evidence in the case before us. It went to the consideration. The lumber which formed part of the consideration [145] of the note was assumed to be worth a certain sum, but its final value was to depend on the sales. If overvalued, there would be a failure of consideration by the amount of the excess. If undervalued, the defendant was to pay the difference. As the estimate fell short of the value as ascertained, this part of the evidence operated in favor of the plaintiff. With regard to that part of the note in suit which arose from the H. debt, if that was not at the defendant's risk, if lost without negligence imputable to him, there would be a failure of consideration to that amount. Now the evidence proves that the defendant did not become the guarantor of the H. note, and that it was not taken at his risk. It has been lost. That loss must fall upon the plaintiff unless negligence in relation to it is chargeable to the defendant."

§ 554. **Same subject.** On like principles, in an action against the maker of a promissory note by an assignee with notice, it was held a good defense that the note was given in consideration of a tract of land, and that at the time of making the note it was verbally agreed between the payee and the defendant that he should not be called on for its payment until the payee should obtain a patent from the United States for the land, which was expected before the note would by its terms mature, and that the payee had not obtained the patent.<sup>1</sup> The court allowed the defense because the consideration for which the note was given had not been received by the defendant. Where a note was given instead of a receipt for money paid before it was due, the transaction was allowed to be proved by parol, and the fact being admitted by demurrer, it was held that there was no good ground for a promise.<sup>2</sup> And where the only consideration of a note was a promise by the payee to convey to the maker on payment a tract of land, if the payee should own it, and if not, that he would buy it as cheap as he could and let the maker have it at cost, and the payee died insolvent before the note became due, without title

<sup>1</sup> Gorham v. Peyton, 3 Ill. 363.

<sup>2</sup> Slade v. Halsted, 7 Cow. 322.

to the land, it was ruled that the consideration of the note had wholly failed and the maker had a right to treat it as a nullity.<sup>1</sup> So in an action upon a note given for the price of per- [146] sonal property, a parol agreement for a deduction in case the property should not prove to be of certain quality was deemed equivalent to a warranty; and on that defense the action was defeated.<sup>2</sup>

An assurance given to a surety by the obligee, when solicited by the obligor to execute with him a writing obligatory, that the signing was but a matter of form, and that he should not be applied to for payment, has been proven, as tending to show that the execution of the instrument was procured by fraud, in an action against such surety to enforce the obligation.<sup>3</sup> An acceptor sued by the indorsee of a bill may show by parol that the acceptance was for the plaintiff's accommodation, and without consideration; and for this purpose that it was agreed that the bill, when due, should be taken up by the plaintiff.<sup>4</sup> A note purported to be for consideration due to the plaintiff for business transacted for the defendant; but it was allowed to be shown by parol that the real consideration for which it was made was future services which had not been performed.<sup>5</sup>

Where the consideration of a note was the assignment of a half interest in a bond for the conveyance of land, and it was agreed between the parties that the assignee should pay, by his note to the assignors, the same amount they had given therefor, and, through this misrepresentation, the note was taken for four times the sum paid for the same, the recovery was limited to the amount actually paid.<sup>6</sup> It is often difficult to determine, on a given state of facts, whether the parol evidence offered goes to the contract or the consideration. The difficulty is particularly apparent where a note or bill is based upon some precedent transaction, and by a contemporaneous

<sup>1</sup> Tillotson v. Grapes, 4 N. H. 455. see Barnstable Savings Bank v. See First Nat. Bank v. Breese, 39 Ballou, 119 Mass. 487. Iowa, 640.

<sup>2</sup> Shepherd v. Temple, 3 N. H. 455. 212.

<sup>3</sup> Miller v. Henderson, 10 S. & R. 590; Hain v. Kalbach, 14 id. 159; <sup>4</sup> Thompson v. Clublely, 1 M. & W. 791. See Pecker v. Sawyer, 24 Vt. Zeibert v. Grew, 6 Whart. 404. But 459.

<sup>5</sup> Stevens v. McIntire, 14 Me. 14.

verbal agreement resort may be had to that transaction for a new and more accurate statement of the amount of the debt, or of some ground of deduction; or it is agreed that in a specified event the note or bill is to be void without actual payment; or that it shall be paid only out of some special fund contemplated to exist. In cases of doubt there is a leaning — of the English more strongly than of the American courts — against the admission of the evidence, and even where there is much reason to believe that the inducement to make or become a party to the bill or note was the promise held out of relief, in whole or in part, from the obligation, in the manner indicated by such extraneous proof. If the evidence tends to show a defect of consideration it is admissible,<sup>1</sup> but otherwise not. This test, however, has not in all cases been very rigidly observed.<sup>2</sup> It may be well to express what is implied in the preceding discussion, that the parties to a negotiable instrument may make the consideration for it a matter of contract, in which case parol proof is not admissible to show that it is other or different from that which is expressed.<sup>3</sup>

**§ 555. Liability of drawer and indorser for principal sum.** All persons joining in drawing a bill are liable to the holder as drawers, whether personally interested in the consideration or not; an accommodation drawer is liable to all parties who become the holders, except the accommodated party, in the due course of business, unless there has been a diversion of the paper from the special use intended, when it is good only to a *bona fide* holder for value. Where several persons join as drawers they are also jointly liable to the ac-

<sup>1</sup> Smith v. Brooks, 18 Ga. 440.

Warren Academy v. Starrett, 15

<sup>2</sup> See Goddard v. Hill, 33 Me. 582; Mahan v. Sherman, 7 Blackf. 378; Miller v. White, id. 491; Leighton v. Grant, 20 Minn. 345; Lash v. McCormick, 17 id. 403; Walters v. Armstrong, 5 id. 448; Spring v. Lovett, 11 Pick. 417; Campbell v. Hodgson, Gow, 74; Mosely v. Hanford, 10 B. & C. 729; Hodgkins v. Moulton, 100 Mass. 309; Sawyer v. Chambers, 44 Barb. 42; Allen v. Furbish, 4 Gray, 504; Pecker v. Sawyer, 24 Vt. 459;

Me. 443; Isaacs v. Elkins, 11 Vt. 679; Fairfield T. Co. v. Thorp, 13 Conn. 173; Foster v. Jolly, 1 Cr., M. & R. 703; Pike v. Street, M. & M. 226; Susquehannah B. & B. Co. v. Evans, 4 Wash. C. C. 480; Hill v. Ely, 5 S. & R. 363; Abbott v. Hendricks, 1 M. & G. 791; Conner v. Clark, 12 Cal. 168; Hyde v. Tenwinkel, 26 Mich. 93.

<sup>3</sup> Reisterer v. Carpenter, 124 Ind. 30; Hubbard v. Marshall, 50 Wis. 322.

ceptor, if they draw without funds and he pays the bill. It is money paid at their request, and the amount paid is recoverable.<sup>1</sup> "The presumption that the drawer has funds in the hands of the acceptor may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obligation the acceptor may have an action against the [148] drawer, but not on the bill itself.<sup>2</sup> As between the drawer and drawee the bill is a mere request or direction to pay money; it never speaks, as it does between other parties, the language of contract, or imports any obligation. When the acceptor sues, whether he declares specially on the implied promise to indemnify, or generally for money paid, the bill itself is not the foundation of the action; it is but an item of evidence."<sup>3</sup> The drawer's contract, as such, to the holder of the paper is to pay the sum mentioned in the bill conditionally; that is, if the bill is not accepted and paid by the drawee, and notice of the dishonor be duly given. His liability is that of the first indorser of a promissory note.<sup>4</sup>

The drawing as well as the negotiating of a bill implies an undertaking to the payee, and to every other person to whom the bill may afterwards be transferred, that the drawee is a person capable of accepting the bill, and making himself responsible for its payment; that he shall, if applied to for that purpose, express in writing upon the bill an undertaking to pay when it shall become payable; that he shall pay it on

<sup>1</sup> Griffith v. Reed, 21 Wend. 502.

<sup>2</sup> Id., per Bronson, J.; Young v. Hockley, 3 Wils. 346; Chilton v. Whiffin, id. 13; Chitty on Bills, 344, 410.

<sup>3</sup> Griffith v. Reed, *supra*. It was held in this case that there was no implied promise of the surety to repay the acceptor.

But in *Suydam v. Westfall*, 2 Denio, 205, such an action was sustained by the court of errors. Bockee, Senator, said: "As relates to all intervening parties, the acceptor of a bill

of exchange is considered to stand in the same position as the maker of a promissory note. The drawers are in the character of indorsers. But this analogy ceases when the acceptor has paid the bill from his own funds. The relation between the drawer and the drawee is then reversed, and the former becomes the debtor."

<sup>4</sup> 1 Parsons on N. & B. 54; Ballingalls v. Gloster, 3 East, 481; S. C., 4 Esp. 268.



presentment for that purpose when it becomes payable; and that if the drawee fail to do either, he, the drawer, will pay the amount stated in the bill, with legal damages thereon, provided he have due notice of the dishonor.<sup>1</sup> The indorsement of a bill or note is equivalent to the drawing of a bill; the former is like a new bill drawn by the indorser on the [149] drawee or acceptor; and the latter by the indorser on the maker in favor of the indorsee.<sup>2</sup> The indorser warrants that the bill or note will be accepted and paid, according to its tenor; that it is in every respect genuine; that it is valid; that the ostensible parties are competent, and that he has lawful title to and the right to indorse it.<sup>3</sup> Of course, if the drawer's or indorser's contract in any of these particulars is not fulfilled he is liable, either on the principle of the failure of consideration, or on the contract.<sup>4</sup>

One who transfers such paper without indorsement impliedly warrants that it is valid, so far, at least, as he has been connected with its origin, as that it is not to his knowledge void for usury.<sup>5</sup> So, a drawer or indorser without recourse undertakes that the paper is what it purports to be, a valid

<sup>1</sup> Bayley on Bills, ch. 5; Story on Bills, § 108; Edwards on Bills, 287; Evans v. Gee, 11 Pet. 80; Mellish v. Simeon, 2 H. Bl. 378; Milford v. May, 1 Doug. 55; Mason v. Franklin, 3 Johns. 202; Walker v. Bank, 13 Barb. 636; S. C., 9 N. Y. 582.

<sup>2</sup> Grinnell v. Herbert, 5 A. & E. 436.

<sup>3</sup> 1 Daniel on Neg. Inst., § 669; Turnbull v. Bowyer, 40 N. Y. 456; Blethen v. Lovering, 58 Me. 437; Bank of Commerce v. Union Bank, 3 N. Y. 230; Coolidge v. Brigham, 1 Met. 547; Mills v. Barney, 22 Cal. 240. See Swall v. Clarke, 51 Cal. 227.

<sup>4</sup> Chitty on Bills, \*95; Edwards on Bills, 291; 1 Daniel on Neg. Inst., § 669; Canal Bank v. Bank of Albany, 1 Hill, 287; Little v. Derby, 7 Mich. 325; Gurney v. Womersley, 4 E. & B. 133; S. C., 28 Eng. L. & Eq. 256; Appleton Bank v. McGilvray, 4

Gray, 518; Hurst v. Chambers, 12 Bush, 155.

<sup>5</sup> Whitney v. Nat. Bank, 45 N. Y. 305; Bell v. Dagg, 60 id. 528; Smith v. Corege, 53 Ark. 295; Delaware Bank v. Jarvis, 20 N. Y. 226. See Brown v. Montgomery, id. 287.

An oral warranty of the collectibility of a note is not within the statute of frauds. Smith v. Corege, *supra*; Milks v. Rich, 50 N. Y. 269. On such a warranty the assignor will be estopped by a judgment against his assignee, and if he directs the latter to sue the maker of the note he will be liable for the amount he received for it and the costs of the suit. Smith v. Corege, *supra*. If, however, the genuineness of the note has been considered by the parties and the vendor has declined to warrant it the rule is otherwise. Bell v. Dagg, 60 N. Y. 528.

obligation of those whose names are upon it.<sup>1</sup> He is liable if any of the prior signatures are not genuine;<sup>2</sup> if the instrument was invalid between the original parties by reason of payment or set-off,<sup>3</sup> for want of consideration,<sup>4</sup> or illegality of the consideration, or if any prior party was incompetent, or the indorser without title;<sup>5</sup> so if there be fraud or misrepresentation.<sup>6</sup>

Although the drawer or indorser is held to such implied warranties, the damages are not assessed in respect to the principal sum according to the general rule applicable to warranties of quality or title of personal property, which is that the warrantor shall pay so much as the actual value of property falls short of what it would be worth if the warranty had been kept good. On the contrary, where recourse [150] is had to an indorser, the recovery on account of the principal sum is limited to the amount paid; in other words, there is a compulsory refunding of the consideration and interest thereon.<sup>7</sup> Where, however, a party purchases accommodation paper at less than its face, on representations made by a party to it that it is business paper, and he relies on them, he will be entitled to the whole sum payable by its terms, although it exceeds the amount paid for it, with the legal interest thereon.<sup>8</sup> And if an indorser who has been made liable to his indorsee on account of his indorsement settles with the latter, and obtains a transfer of the bill, he may

<sup>1</sup> Daniel, Neg. Inst., § 670.

<sup>2</sup> Damon v. Williamson, 18 Ohio St. 515.

<sup>3</sup> Ticonic Bank v. Smiley, 27 Me. 225.

<sup>4</sup> Blethen v. Lovering, 58 Me. 437; Gompertz v. Bartlett, 2 E. & B. 849; S. C., 24 Eng. L. & Eq. 156.

<sup>5</sup> Daniel, Neg. Inst., § 670.

<sup>6</sup> Prettyman v. Short, 5 Harr. (Del.) 360. See Curtis v. Brooks, 37 Barb. 476.

<sup>7</sup> Smeltzer v. White, 92 U. S. 390; Munn v. Commission Co., 15 Johns. 43; Cram v. Hendricks, 7 Wend. 569; Ingalls v. Lee, 9 Barb. 647; Hutchins v. McCann, 7 Porter, 94;

Noble v. Walker, 32 Ala. 456; Raplee v. Morgan, 3 Ill. 561; Shaeffer v. Hodges, 54 Ill. 337; Braman v. Hess, 13 Johns. 52; Short v. Coffeen, 76 Ill. 245; Wynn v. Poynter, 3 Bush, 54; Semmes v. Wilson, 5 Cr. C. C. 285; Bank of U. S. v. Smith, 4 id. 712; Cook v. Clark, 4 E. D. Smith, 213; Judd v. Seaver, 8 Paige, 548.

In *Mechanics' Bank v. Minthorne*, 19 Johns. 244, it was held that the plaintiff, as indorsee, was not precluded from recovering against the indorser seven per cent., the legal rate, by having discounted the note at six.

<sup>8</sup> Burrall v. De Groot, 5 Duer, 379.

recover on it from the acceptor for his own use the same amount which his indorser might have recovered, or rather what he would have recovered if he had not negotiated the bill. And it is immaterial whether, upon such transfer, he paid more or less, or merely gave a new security.<sup>1</sup>

§ 556. **Interest on notes and bills.** Interest is only allowed before maturity when expressly stipulated for; but when it is clearly reserved, it is calculated from the date of the instrument unless a different time is specified for it to begin.<sup>2</sup> The simple words "with interest," or similar phrase, will suffice to give interest from date.<sup>3</sup> And on such a general reservation of interest, it may be recovered from date [151] until paid, although at maturity no suit could be brought.<sup>4</sup> And it is the same if payable at the end of a specified time from the death of the maker.<sup>5</sup> Commonly speaking, an instrument of this sort, reserving interest in general terms, carries interest from date, whether payable on demand or at a specified time. The reason is that the party making the promise is expected to keep it; and, if he does, no interest can be due from any other period than its date.<sup>6</sup>

<sup>1</sup> *Deas v. Harvie*, 2 Barb. Ch. 448.

<sup>2</sup> *Kennerly v. Nash*, 1 Stark. 453; *Hopper v. Richmond*, id. 507.

<sup>3</sup> *Id.*; *Dewey v. Bowman*, 8 Cal. 145; *Winn v. Young*, 1 J. J. Marsh. 51; *Ely v. Witherspoon*, 2 Ala. 131; *Dickinson v. Tunstall*, 4 Ark. 170; *English v. Watkins*, id. 199; *Kilgore v. Powers*, 5 Blackf. 22; *Pate v. Gray*, Hemp. C. C. 155; *Doman v. Dibden*, Ry. & M. 381; *Whitton v. Swope*, 1 Litt. 160; *Roffey v. Greenwell*, 10 A. & E. 222; *Connors v. Holland*, 113 Mass. 50; *Pittman v. Barrett*, 34 Mo. 84.

<sup>4</sup> A married woman, being administratrix, received a sum of money in that character, and loaned it to her husband, and took for it the joint and several promissory note of her husband and two other persons, payable to her with interest; held, that although she could not have maintained an action upon the note dur-

ing the life-time of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to her, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note. *Richards v. Richards*, 2 B. & Ad. 447.

<sup>5</sup> *Roffey v. Greenwell*, 10 A. & E. 222.

<sup>6</sup> *Id.* Lord Denman said in this case: "There is, indeed, another period from which it might be computed, that of the maker's death; but it appears improbable that if that was his intention he should not have expressed it with more distinctness. We think that in the absence of all particular proof we must presume the note to have been given for value, so that interest would be due from

The courts adopt a construction favorable to interest, or most strongly against the maker; and where interest is promised to be paid in general terms in case the note shall not be paid at maturity, it is computed from date.<sup>1</sup> The rate stipu- [152] lated to be paid before maturity generally governs to the date of payment or judgment, if not in contravention of any statute;<sup>2</sup> and upon the assumption that such was the intention of the parties, such agreements are construed to mean that interest at the conventional rate shall continue not only to the time specified for payment, but until actual payment. There is, however, a want of harmony in the decisions upon this point. In Minnesota the legal rate governs arbitrarily after maturity, if the parties have stipulated for a rate generally above it or have even agreed, in express terms, that such rate shall be computed until the debt is paid. Any rate in excess of the legal rate stipulated to be paid while the debtor is in default is treated as penalty, and only the legal rate is allowed.<sup>3</sup> In many cases elsewhere it has been held that the agreement fixing the rate without specifying the period for which it shall be computed is intended to have effect only during the period of credit; that if the parties desire to regulate the rate to be allowed afterwards, they should do so expressly by agreeing that it shall continue after maturity or "until

the date. If that be doubtful, the instrument ought to be construed most strongly against the maker." Washband v. Washband, 24 Conn. 500; Adairs v. Wright, 14 Iowa, 22. See Carter v. King, 11 Rich. 125; Rollman v. Baker, 5 Humph. 406; Powell v. Guy, 3 Dev. & Batt. 70.

<sup>1</sup>Several notes were payable at distant days; some at three per cent. per annum, if paid at maturity; "if not, six per cent. interest to be paid;" and one payable without interest. "until the note is out, if not paid then lawful interest until paid." They were not paid at maturity, and it was held that interest was recoverable according to the agreements therein from date. Daggett v. Pratt, 15 Mass. 177; Parvin v. Hoopes, Mor-

ris (Ia.), 294; Horn v. Nash, 1 Iowa, 204; Hackenbury v. Shaw, 11 Ind. 392. The cases of Billingsly v. Cahoon, 7 Ind. 184, and Wernwag v. Mothershead, 3 Blackf. 401, are perhaps distinguishable, and not to be considered as inconsistent; because in each the agreement was for a higher rate of interest upon default than the law would give in the absence of any agreement; and hence, as effect could be given to the language employed, without allowing interest from the date of the notes, it was allowed to run from their maturity only. 2 Parsons on N. & B. 382, note *d*. See Flanders v. Chamberlain, 24 Mich. 305.

<sup>2</sup>See *ante*, vol. 1, § 306 *et seq*.

<sup>3</sup>See *ante*, vol. 1, § 310.



paid.”<sup>1</sup> In Connecticut the conventional rate before maturity is applied during the period of default, not so much on the ground that the contract as such covers that period, as on the principle that it should be deemed a just rate because the parties had agreed to it before maturity.<sup>2</sup>

A stipulation for interest without stating the rate is a contract for the legal rate; and this rate, and the validity of any stipulation specifying the rate, are to be determined by the law of the place of contract, which is the place where the contract is entered into, unless it was made with reference to the laws of some other state or country. A contract is governed by the laws of the place where it is to be performed.<sup>3</sup> If

<sup>1</sup> See *ante*, vol. 1, § 309; *Brewster v. Wakefield*, 22 How. 127; *Burnhisel v. Firman*, 22 Wall. 170.

<sup>2</sup> See *ante*, vol. 1, § 309, n. In ch. 8, vol. 1, the subject of interest is fully treated.

<sup>3</sup> *Gaylord v. Johnson*, 5 McLean, 448; *Arrington v. Gee*, 5 Ired. L. 590; *M'Queen v. Burns*, 1 Hawks, 476; *Doris v. Coleman*, 7 Ired. L. 424; *Hunt's Ex'r v. Hall*, 37 Ala. 702; *Barney v. Newcomb*, 9 Cush. 46; *Campbell v. Nichols*, 33 N. J. L. 81; *Lee v. Selleck*, 20 How. Pr. 275; S. C., 33 N. Y. 615; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Cook v. Moffat*, 5 How. (U. S.) 295; *Bright v. Judson*, 47 Barb. 29; *Everett v. Vandryes*, 19 N. Y. 436; *Bailey v. Heald*, 17 Tex. 102; S. C., 14 Tex. 226; *Lizardi v. Cohen*, 3 Gill, 430; *Worcester Bank v. Wells*, 8 Met. 107; *Lewis v. Owen*, 4 B. & Ald. 654; *Smith v. Buchanan*, 1 East, 6; *Quin v. Keefe*, 2 H. Black. 553; *Bainbridge v. Wilcocks*, Bald. 536; *Boyce v. Edwards*, 4 Pet. 111; *Cooper v. Waldegrave*, 2 Beav. 282; *Braynard v. Marshall*, 8 Pick. 194; *Wilde v. Sheridan*, 21 L. J. (Q. B.) 260; S. C., 16 Jur. 426; 11 Eng. L. & Eq. 380; *Barker v. Sterne*, 9 Exch. 684; S. C., 25 Eng. L. & Eq. 502; *Hanrick v. Andrews*, 9 Port. 9; *Healey v. Gorman*, 15 N. J. L. 328; *Evans v. Clark*,

1 Port. 388; *Evans v. Irwin*, id. 390; *Chase v. Drew*, 47 N. H. 405; *Hoppins v. Miller*, 17 N. J. L. 185; *Butters v. Olds*, 11 Iowa, 1; *Burton v. Anderson*, 1 Tex. 93; *Lines v. Mack*, 19 Ind. 223; *Peacock v. Banks*, Minor (Ala.), 387; *Peck v. Mayo*, 14 Vt. 33; *Ramsey v. McCauley*, 2 Tex. 189; *Chambliss v. Robertson*, 23 Miss. 302; *Jack v. Nichols*, 5 N. Y. 178; *Kavanaugh v. Day*, 10 R. I. 393; *Hacketts-town Bank v. Rea*, 6 Lans. 455; S. C., 64 Barb. 175; *Agricultural Nat. Bank v. Sheffield*, 4 Hun, 421; *Scofield v. Day*, 20 Johns. 102; *Newman v. Kershaw*, 10 Wis. 333; *Findlay v. Hall*, 12 Ohio St. 610; *McClintick v. Cummins*, 3 McLean, 158; *Consequa v. Willings*, Pet. C. C. 229; *Archer v. Dunn*, 2 W. & S. 327; *Ralph v. Brown*, 3 id. 395; *Anonymous, Mart. & Hayw.* 149; *Consequa v. Fanning*, 3 Johns. Ch. 587; S. C., 17 Johns. 511; *Stewart v. Ellice*, 2 Paige, 604; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Irvine v. Barrett*, 2 Grant's Cas. 73; *Roberts v. McNeely*, 7 Jones' L. 506; *Swet v. Dodge*, 4 Sm. & M. 667; *Gaillard v. Ball*, 1 N. & McC. 67; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Cowqua v. Laudebrun*, 1 id. 521; *Busby v. Caraac*, 4 id. 296; *Bank of Illinois v. Brady*, 3 McLean, 268; *Moore v. Davidson*, 18 Ala. 209; *Lef-*

made in one state or country and payable in another, [153] and not made to evade the usury laws of one of them, it will be sustained if the rate of interest is valid by the laws of either.<sup>1</sup> But the fate of a contract which violates the [154] laws of both the country or the state where it is made and that where it is to be performed will be determined by those of the former.<sup>2</sup>

Where the rate is governed by any other than the law of which the court takes judicial notice it is for the jury to ascertain what the rate by that law is as a fact; but it is for the court, as a matter of law, to direct them as to the place according to the laws of which the interest is to be assessed.<sup>3</sup> Where the rate is governed by the laws of another jurisdiction they must be alleged and proved;<sup>4</sup> otherwise interest according to the law of the forum will be given.<sup>5</sup>

ler v. Dermotte, 18 Ind. 246; Von Hemert v. Porter, 11 Met. 210; Winthrop v. Carlton, 12 Mass. 4; Hawley v. Sloe, 12 La. Ann. 815; Little v. Riley, 43 N. H. 109; Bolton v. Street, 3 Cold. 31; Summers v. Mills, 21 Tex. 77; Whitlock v. Castro, 22 id. 108; Butler v. Meyer, 17 Ind. 77; Bent v. Lauve, 3 La. Ann. 88; Smith v. Smith, 2 Johns. 235; Don v. Lippmann, 5 Cl. & F. 1; Balme v. Wombough, 38 Barb. 352; Collins Iron Co. v. Burkam, 10 Mich. 283; Fergusson v. Fyffe, 8 Cl. & F. 121; Cash v. Ken- nion, 11 Ves. 314; Robinson v. Bland, 2 Burr. 1077; Ekins v. East India Co., 1 P. Wms. 395; Houghton v. Page, 2 N. H. 42; Lapice v. Smith, 13 La. 91; Mullin v. Morris, 2 Pa. St. 85; Chapman v. Robertson, 6 Paige, 627; Richards v. Globe Bank, 12 Wis. 692; McAllister v. Smith, 17 Ill. 328; Van Schaick v. Edwards, 2 Johns. Cas. 355; Pearce v. Wallace, 1 Har. & J. 48; Goddin v. Shipley, 7 B. Mon. 575.

<sup>1</sup> Andrews v. Pond, 13 Pet. 65; Richards v. Globe Bank, 12 Wis. 692; Jewell v. Wright, 12 Abb. 55, reversed, 30 N. Y. 259; Kilgore v. Dempsey, 25 Ohio St. 413; Bowen v. Bradley, 9 Abb. (N. S.) 395; Cope

v. Wheeler, 41 N. Y. 303; Agricultural Nat. Bank v. Sheffield, 4 Hun, 421; Vliet v. Camp, 13 Wis. 198; Engler v. Ellis, 16 Ind. 475.

<sup>2</sup> Andrews v. Pond, *supra*; Pine v. Smith, 11 Gray, 38; Mix v. Madison Ins. Co., 11 Ind. 117; Adams v. Robertson, 37 Ill. 45.

<sup>3</sup> Gibbs v. Fremont, 9 Exch. 25; Leavenworth v. Brockway, 2 Hill, 201; Wheeler v. Pope, 5 Tex. 262; Hill v. George, id. 87; Pridgen v. McLean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388.

<sup>4</sup> Surlott v. Pratt, 3 A. K. Marsh. 174; Burton v. Anderson, 1 Tex. 93; Wheeler v. Pope, 5 Tex. 262; Hill v. George, id. 87; Abel v. McMurray, 10 id. 350; Pridgen v. McLean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388.

According to the foregoing cases, where the note sued on is payable in another state no interest at all can be allowed unless the law of the state where it is payable is proved and shows a right to interest. See *ante*, vol. 1, § 358 *et seq.*

<sup>5</sup> Surlott v. Pratt, 3 A. K. Marsh. 174; Desnoyer v. McDonald, 4 Minn.

§ 557. **Interest as damages to be paid by maker or acceptor.** Where the note or bill is silent as to interest, none is payable until maturity. If it be not then paid, interest is universally allowed from maturity unless the delay is by the fault of the holder.<sup>1</sup> And so much is interest the customary and invariable compensation for money delinquent on commercial paper that where a party undertakes to pay a debt by means of a bill or note and fails to do so, interest will be allowed as it would accrue upon such note or bill if it had been given according to the undertaking.<sup>2</sup> If paper is payable on demand interest does not run until demand is made by suit or otherwise.<sup>3</sup> But a note expressing no time when payable is due immediately, and bears interest from date.<sup>4</sup>

The rate of interest after maturity for default of payment, even when not expressly or by implication fixed by contract, is generally held to be that prescribed by the law of the place of contract; in other words, the law of the place where the note is made payable, or of the place on which the bill is drawn.<sup>5</sup> If no place of payment is mentioned, that where the note is made or the bill accepted is the place of contract. But

515: *Martin v. Martin*, 1 Sm. & M. 176; *Brown v. Gracy*, D. & Ry. N. P. 41, note; *De La Chaumette v. Bank of England*, 9 B. & C. 208; *Fouke v. Fleming*, 13 Md. 392; *Whidden v. Seelye*, 40 Me. 247; *Deem v. Crume*, 46 Ill. 69; *Prince v. Lamb*, 1 id. 378; *Chumasero v. Gilbert*, 26 id. 39; *Hall v. Kimball*, 58 id. 58; *Lougee v. Washburn*, 16 N. H. 134; *Hall v. Woodson*, 13 Mo. 462; *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Leavenworth v. Brockway*, 2 Hill, 201; *Booty v. Cooper*, 18 La. Ann. 565.

<sup>1</sup> *Gantt v. Mackenzie*, 3 Camp. 51; *Mayne on Dam.* 105; *Thorndike v. United States*, 2 Mason, 1; *Robinson v. Bland*, 2 Burr. 1077; *Bann v. Dalzel*, M. & M. 228; *Laing v. Stone*, 2 M. & Ry. 561; *Greenleaf v. Kellogg*, 2 Mass. 568; *Hastings v. Wiswall*, 8 id. 455.

<sup>2</sup> *Marshall v. Poole*, 13 East, 98; *Slack v. Lowell*, 3 Taunt. 157; *Farr v. Ward*, 3 M. & W. 25; *Rhoades v.*

*Selsey*, 2 Beav. 350; *Beeher v. Jones*, 2 Camp. 428, note.

<sup>3</sup> *Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor (Ala.), 417; *Freeland v. Edwards*, Mart. & Hayw. 207; *Lewis v. Lewis*, id. 191; *Hard v. Palmer*, 21 Up. Can. Q. B. 49; *Patrick v. Clay*, 4 Bibb, 246; *Bartlett v. Marshall*, 2 Bibb, 467; *Schmidt v. Limehouse*, 2 Bailey, 276. See *Darling v. Wooster*, 9 Ohio St. 517.

<sup>4</sup> *Gaylord v. Van Loan*, 15 Wend. 308; *Lewis v. Lewis*, Mart. & Hayw. 191; *Freeland v. Edwards*, id. 207; *Purdy v. Philips*, 1 Duer, 369; *Francis v. Castleman*, 4 Bibb, 282.

<sup>5</sup> *Campbell v. Nichols*, 33 N. J. L. 81; *Scofield v. Day*, 20 Johns. 102; *Mullen v. Morris*, 2 Pa. St. 85; *Boyce v. Edwards*, 4 Pet. 111; *Braynard v. Marshall*, 8 Pick. 194; *Chapman v. Robertson*, 6 Paige, 627; *Thompson v. Powles*, 2 Sim. 194; *Hosford v. Nichols*, 1 Paige, 220; *Gaylord v. Johnson*, 5 McLean, 448; *Bank of*

the place may be affected by circumstances, as the residence of the parties, and the place where the money is to be used.<sup>1</sup> A bill was drawn on a resident of the state of New York, and by him accepted to be paid in that state, by a resident [156] of Illinois. The acceptance was for the accommodation of the drawer, and for the purpose of being afterwards negotiated by him to raise funds to be used in his business in Illinois, he to provide for its payment. After acceptance the acceptor placed the bill in the hands of the drawer, and he negotiated it for a greater rate of discount than was allowed by the laws of either state. It was held to be governed by the laws of Illinois. Strong, J., said: "The case is exactly the same as it would be if the defendants had been residents of Chicago, where the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the laws of that state." It was treated as a controlling fact that before the acceptance had any operation, before the instrument became a bill, the defendants, who were the acceptors, sent it to Illinois for the purpose of having it negotiated in that state.<sup>2</sup>

**§ 558. Liability of drawer or indorser for interest as damages.** When not fixed by the contract, the liability is governed by the law of the place where the contract of the drawer or indorser is made; for their contract is implied, and the implication is that it is to be performed at the place where

Illinois v. Brady, 3 id. 268; Bright v. Judson, 47 Barb. 29; Lee v. Selleck, 33 N. Y. 615; Cooke v. Crawford, 1 Tex. 9; Burton v. Anderson, id. 93; Wheeler v. Pope, 5 id. 262; Andrews v. Hoxie, id. 171; Barney v. Newcomb, 9 Cush. 46; Hunt v. Hall, 37 Ala. 702; 2 Parsons on N. & B. 371. But see Goddard v. Foster, 17 Wall. 123; Wood v. Corl, 4 Met. 203; Ayer v. Tilden, 15 Gray, 178.

<sup>1</sup> Davis v. Coleman, 8 Ired. 424.

In Austin v. Imus, 23 Vt. 286, it

was held that as between the parties to a promissory note executed in the state of New York and made payable generally, interest should be allowed at Vermont rate, if it appears from the circumstances attending its execution that it was the expectation and intention that it would be paid there. See Thompson v. Ketcham, 8 Johns. 189.

<sup>2</sup> Tilden v. Blair, 21 Wall. 241. See vol. 1, § 364.



it is made.<sup>1</sup> The rule of liability under the English bills of exchange act is stated in a note.<sup>2</sup>

**§ 559. Notes and bills are by definition payable only in money.** Within the domain of the law merchant there is a great variety of moneys made legal tender by many sovereignties, and in many jurisdictions are other currencies not legal tender, but which, to a considerable extent, perform the functions of money by being freely paid and received as a substitute in all local transactions. When an instrument in the form of a note or bill is payable in some special currency, the question has often arisen whether it was payable in money.<sup>3</sup>

<sup>1</sup>Gibbs v. Fremont, 9 Exch. 25; Boyce v. Edwards, 4 Pet. 111. See vol. 1, § 358.

<sup>2</sup>The English bills of exchange act, 1882 (sec. 57, ch. 61, 45-46 Vict.), provides that where a bill is dishonored the measure of damages shall be:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser:

(a) The amount of the bill.

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonored abroad, in lieu of the above damages the holder may recover from the drawer or an indorser, and the drawer or indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The South Australian act (47-48 Vict., No. 312, sec. 57) is identical with the above except that sub-section 1 (b) contains the words after interest thereon, "at the rate of ten pounds per centum per annum." Under this act it has been ruled that when a bill of exchange has been dishonored out of that colony the only damages which the holder can recover are the amount of the re-exchange, with interest thereon, as provided by sub-section 2, and that he has no option to sue for interest under sub-section 1. In re Commercial Bank of South Australia, 36 Ch. Div. 522.

<sup>3</sup>Black v. Ward, 27 Mich. 191. A note made and indorsed in Michigan and payable "in Canada currency" was held to be payable in money, and therefore negotiable. Campbell, J., said: "The indorser's contract being governed by the laws of this state, and the note having been made here, its negotiability must in our courts be tested by our statute; but as that

The determination of this question in the affirmative [157] places the instrument in the category of commercial paper:

is like the statute of Anne, in requiring the paper to be payable in *money*, the only inquiry in this regard is what may be included in that term. It will be found by examining the authorities that the word 'money' has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in construing negotiable paper it has never been extended beyond coin and paper at par value. In England, in the case of *Miller v. Race*, 1 Burr. 452, which involved the rights of holders of stolen Bank of England bills, the language of Lord Mansfield and of the judges was so pointed in treating such notes as cash, that if the question now discussed had been mooted, there can be little doubt how it would have been decided. A series of decisions made afterwards sustained tenders in such bills, where no objection had been made to the medium in which the tender was made. *Polglass v. Oliver*, 2 Cr. & J. 15, 16; *Brown v. Saul*, 4 Esp. 267; *Wright v. Reed*, 3 T. R. 554. And these decisions have been followed universally in this country. The first time when the negotiability of a bill payable in Bank of England notes came up for decision was in the interval between 1797 and 1818, during which the bank was restrained from making specie payments. The statutes containing this restriction provided that if the amount of any debt were tendered in notes the debtor should not be arrested on the debt. *Tomlin's Law Dic.*, 'Bank of England.' It was held in *Grigby v. Oakes*, 2 B. & P. 526, that under this statute notes were not a legal tender. Reference was made by some of the court to the

peculiar terms of the statute, as limiting the effect of the tender to an exemption from arrest. In *Ex parte Davison*, Buck, 31, and *Ex parte Imeson*, 2 Rose, 225, it was held that notes payable in 'cash or Bank of England notes' were not negotiable. In 1834 the notes were made a legal tender; but by the present law they are not such in Scotland or Ireland. *Fisher's Dig.*, 'Bank of England,' 'Tender.' No case has since been reported in which any such question was raised; and whether the silence of the courts arises from the change of the law, whereby the notes are made equivalent to coin, or from any custom excluding any mention of notes in drawing up negotiable paper, we have no means of judging. [158] Where the notes are always convertible and at par with gold, and are a legal tender, there does not seem to be any very good reason for holding a bill payable in notes to be any more objectionable than one payable in coin. In this country all paper not payable expressly in gold is impliedly payable in greenbacks; and we cannot conceive that it can change the legal character of any security to express in it precisely what the law implies. Where a promissory note is payable in anything which is not a legal tender, the authorities are generally, though not universally, against its negotiability. In New York and Ohio bank bills issued under state authority, and where the courts hold they are bound to recognize their quality judicially, have been held at par to represent money, so that notes payable in cash, or in such notes, have been adjudged negotiable. *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Johns. 144; *Swetland v.*

but if decided in the negative, it belongs to another class of contracts which are not governed by the law merchant. The

Creigh, 15 Ohio, 118. But in the same states paper payable expressly in any other bills, or in the bills of specified banks of the state, has been held not negotiable. *Leiber v. Goodrich*, 5 Cow. 186; *Shamokin Bank v. Street*, 16 Ohio St. 1; *Thompson v. Sloan*, 23 Wend. 71; *Little v. Phoenix Bank*, 2 Hill, 425; 7 id. 359. Elsewhere, except where there are statutes to the contrary, there is no considerable support for the doctrine that paper payable expressly in the bank notes of private corporations is negotiable.

"Under the laws of this state bank bills may be levied on, and may be paid over as cash, if the creditor is willing to receive them; but if he refuses they must be sold 'as other chattels.' Comp. L., §§ 6096, 6456. If the term 'Canada currency' should be confined to private bank notes it would be difficult to hold this paper negotiable. In *Thompson v. Sloan* the supreme court of New York held that a note payable in Buffalo in 'Canada money' was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says: 'If it be payable in money it is of no consequence in the currency or money of what country it is payable; in the currency or money of England, France, Spain, Holland, Italy, America or any country.' Story on Bills, § 43; *Chitty on Bills*, 153, 158. We cannot, with any propriety, refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in 'Canada currency' is, or is not, payable in money. It is

claimed on the one side and denied on the other that the term 'currency' is confined in our usage to paper which is not money. Upon this question many authorities have been cited, and we have examined each of them with such other references as we have been able to discover, and are led to the conclusion that there is no foundation for any such doctrine. The only cases in which it has been held that 'currency' does not mean money (except where it has been qualified by some further definition) are certain cases in Iowa and Wisconsin, all of which rest entirely upon decisions where the paper in question was expressly payable in bank notes. None of these decisions support the idea that 'currency' and 'bank notes' are purely convertible terms, and the inference is un- [159] warranted, unless founded on what does not appear in any of those decisions. The decision in *Wright v. Hart*, 44 Pa. St. 454, that paper payable '*in current funds at Pittsburgh*' was not negotiable, was also rested, without any further discussion, upon the authority of former decisions applicable to paper payable in bank notes.

"In *Dillard v. Evans*, 4 Ark. 175, the term 'common currency of Arkansas' (in which certain paper was made payable) was held designed to point out a different currency from that which was legal, and to refer to depreciated paper, which was then, in fact, the common medium of business. And in *Farwell v. Kennett*, 7 Mo. 595, it was held that the insertion of the words 'payable in currency' indicated a design to change the legal import which would have been found had no such words been

currency payable in order to give the contract the qualities of negotiable paper must be money not in the popular sense

inserted. And in *Conwell v. Pumphrey*, 9 Ind. 135, the use of the term 'current funds' was held for the same reason an intentional variation. Subsequent decisions in each of those states have either overruled these cases or so interpreted them as not to make them apply to a case like the one before this court. Reference will be made presently to these later decisions. With these exceptions the general course of authority is in favor of the negotiability of paper payable in currency or current funds. And these decisions rest upon the ground that those terms mean 'money,' as the necessity of having negotiable paper, payable in money, is fully recognized. There is, however, some difference in the methods of arriving at this result, and it is proper to refer to the cases which have used careless language, as well as to those which have laid down rules cautiously. The fact that the bills of sound banks have been received promiscuously with the legal money of the country has led here, as in England, to remarks from courts, based on the assumption—which is well founded—that persons usually do not prefer one to the other, and they sometimes speak of payment in either as amounting to the same thing. It is only where the question is directly presented of a tender actually made in one or the other that discrimination becomes necessary. Thus in *Lacy v. Holbrook*, 4 Ala. 88, where a bill of exchange, payable 'in funds current in the city of New York,' was held negotiable,<sup>4</sup> it was so held because deemed to be payable in cash, in gold or silver coin, 'or its equivalent.' So in *Bank of Peru v. Farnsworth*,

18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Swift v. Whitney*, 20 Ill. 144, and *Hunt v. Devine*, 37 Ill. 137, promissory notes or certificates of deposit, payable in 'currency,' were held to be negotiable on the same ground; but there is reference made to the equivalence of bank notes with other money, which are open to the same hyper-criticism that the court confounded real with conventional money. It is to be observed, however, that none of the cases called for any decision as to what would be a legal tender in payment of such notes.

"The decisions of other states are less open to remark. In Arkansas, where the rule is strict in denying negotiability of paper not payable in money (see *Hawkins v. Watkins*, 5 Ark. 481, and *Dillard v. Evans*, 4 Ark. 175), it was held in *Graham v. Adams*, 5 Ark. 261, that a note payable in 'good, current money of the state' was negotiable. The court, after some discussion, remark: 'A [160] good currency, then, in our opinion, means nothing more than a lawful currency, and that is current coin of the United States.' In *Wilburn v. Greer*, 6 Ark. 255, it was held a note payable in 'Arkansas money' was payable in current coin of the United States, and therefore negotiable. In *Burton v. Brooks*, 25 Ark. 215, it was held a note payable in 'green-back currency' was payable in the currency of the United States, and not in national or other bank notes, and that the meaning was the same as if it had been made payable in dollars only. In Indiana, in *Drake v. Markle*, 21 Ind. 433, it was held that the term 'currency' meant money, and that a note payable



merely, but money which entitles the holder to legal tender [162] currency.<sup>1</sup> Notes payable in current bank notes are

therein was negotiable. This case practically overrules *Conwell v. Pumphrey*, which, as we have seen, was decided on the assumption that parties never use unnecessary words in making negotiable paper. In *Mississippi, in Mitchell v. Hewitt*, 5 S. & M. 361, the note was payable in 'currency of the state of Mississippi.' The court say that this phrase 'can only mean that which has been declared to be a legal tender, because currency implies lawful money.' Reference was made to an early Pennsylvania case, *Wharton v. Morris*, 1 Dall. 133, where, upon a similar state of facts, it became necessary to define the words of a note. The court there held that 'lawful' and 'current' were synonymous words, and said the 'lawful current money of Pennsylvania,' that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress. In *Lee v. Biddis*, 1 Dall. 188, it was further held (as must necessarily be the case if courts are to construe such language), that evidence could not be received to give any other explanation. In *Minnesota, in Butler v. Paine*, 8 Minn. 324, currency was held to be lawful money; and the following definition from *Bouvier's Law Dictionary* was approved: 'The money which passes at a fixed value from hand to hand; money which is authorized by law.' In *Missouri*, where, in an earlier case (*Farwell v. Kennett*, 7 Mo. 595), it had been held, as it had been in *Indiana*, 'that words of surplusage must have a controlling and repugnant meaning, and that a note payable 'in currency' was not

payable in money, it was distinctly held in *Cockrill v. Kirkpatrick*, 9 Mo. 688, that paper payable in 'currency of Missouri' was payable in lawful money of the United States, and that Missouri currency could mean nothing else. In *Tennessee* it was held, in *Searcy v. Vance*, Mart. & Y. 225, that paper payable in 'Tennessee money' was only payable in gold and silver, and that those words would not include bank notes. The same state holds paper payable in current bank notes of Tennessee, or in such notes generally, not to be negotiable. *Kirkpatrick v. McCullough*, 3 Humph. 171; *Whiteman v. Childress*, 6 Humph. 303; *Simpson v. Mouldeu*, 3 Cold. 429; *McDowell v. Keller*, 4 Cold. 258. In *Louisiana* it was held, in *Fry v. Dudley*, 20 La. Ann. 368, that a bill of exchange payable 'in currency' is payable in legal current money, and a person who receives such a bill for collection is not authorized to receive anything else. In *Ehle v. Chittengo Bank*, 24 N. Y. 548, a dividend, 'payable in New York state [161] currency,' was held payable in cash. And it was held incompetent to inquire of a cashier what he understood that phrase to mean. The court say: 'The term "New York state currency" must be held to mean what the ordinary signification of those words implies, unless by some general known usage some other technical meaning can be attached to it.'

"We have been referred to the case of *Gray v. Worden*, 29 Up. Can. Q. B. 535, as bearing adversely on this point. That case decides that a note payable 'in Canada bills' is not negotiable, even though construed to

<sup>1</sup> Id.

not negotiable paper.<sup>1</sup> In an action on such a note or other form of agreement, the plaintiff must prove the value of such bank paper; otherwise it has been held he is not entitled to

mean government legal tender notes. It is based upon the decisions made in England and America relative to paper payable in bank notes, and holds the official notes as mere promises to pay money, and not as money. That doctrine would not be admissible under our legal tender laws. But the case is chiefly relied on for some remarks it contains distinguishing the word 'currency' from 'money.' It seems to have been supposed by counsel that this distinction was the same as between bills and money; or, in other words, that currency and bills are synonymous. This is an evident misapprehension. The language used is this: 'There is a difference between money and currency. In *Landsdowne v. Landsdowne*, 2 Bligh, 78, Lord Redesdale said, in 1820: "There is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. There is no such thing as Irish money; it is Irish currency." See, also, *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16.' The distinction which the Canada court points out is not one between paper and coin, but between the values of money in different countries. In the cases referred to it appears that the difference between the Irish pound sterling and the English pound sterling was such that twelve English pounds were equivalent to thirteen Irish pounds. In like manner, a Canadian pound represents only four-fifths of an English pound, and the old New York pound was but two dollars and a half; the New York shilling being twelve and a

half cents, the Canadian shilling twenty cents, and the British shilling taken nominally at about twenty-five cents. The pound in Jamaica is five-sevenths of the English pound. *Scott v. Bevan*, 2 B. & Ad. 78. Judge Story has collected some learning on this subject in *Conflict of Laws*, §§ 308-313. See, also, *Taylor v. Booth*, 1 C. & P. 286; *Cope v. Cope*, 15 Sim. 118. In *Macrae v. Goodman*, 10 Jur. 555; 5 Moore, P. C. 315, a similar consideration came up in regard to 'Holland currency,' where that term was used in a contract made in Guiana, the colonial guilder being different from the Dutch guilder. In *Landsdowne v. Landsdowne* the question was whether, under a marriage settlement, a rent charge on lands in Ireland was payable in English currency, that is to say, whether the annuity of 3,000l. was to be in English pounds sterling or at a less rate. The currencies of Ireland and England have, it is said, been equalized since that decision. But there was not then, as remarked by Lord Redesdale, any Irish coinage, and the difference was merely one of computation."

<sup>1</sup> *Whiteman v. Childress*, 6 Humph. 303; *Looney v. Pinckston*, 1 Overt. 384; *Childress v. Stuart*, Peck, 276; *Gamble v. Hatton*, id. 130; *Lawrence v. Dougherty*, 5 Yerg. 435; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Hopson v. Fountain*, 5 id. 140. In the last case suit was brought on a note payable "in current bank money of the state of Mississippi." On the trial the jury were instructed that this did not entitle the holder to the number of dollars specified in it, with interest; that the word money

[163] judgment for any sum.<sup>1</sup> And it has been held, if payable in "current bank notes," without any other description, they would be regarded such as are convertible into specie at

had a technical legal meaning, signifying dollars and cents of constitutional currency, to wit, gold and silver. But on error this was held wrong. Reese, J., said: "We cannot consent to the correctness of this definition of the word *money*. It is a generic term, embracing, according to the subject-matter of the discourse or writing, every species of coin or currency — guilders, guineas, Napoleons, eagles and bank notes as well as dollars. But if its meaning were, as the circuit court holds, when standing alone, *per se*, still, like all other words, its meaning will be modified by accompanying words or phrases. Here the accompanying and qualifying words are current *bank money* of the state of Mississippi. *Bank money* means that species of money called *bank notes*; and of that species the parties in this case meant that sort or variety called Mississippi bank notes. They may not be the very best, but, at all events, they are those about which the parties contracted. The meaning and intention of the parties on the face of the instrument it is not difficult to perceive. Whether, on the grounds of policy, it would originally have been better, in the construction of all such instruments, to have held the word *dollar* to have referred, not to the numerical amount of the bank notes, but to the standard of value, it is now useless to inquire. The principle in cases where it can apply has been long and well established. Society conforms to it in their contracts, and it must be adhered to. The measure of damages

in this case is the value of the current Mississippi bank notes when the covenant was payable." *Hixon v. Hixon*, 7 Humph. 33. In *Baker v. Jordan*, 5 id. 85, in covenant, there was a plea of covenants performed; no proof was introduced except a note for dollars payable in current bank notes. It was held that the jury was warranted in giving a verdict for the number of dollars called for.

*Ward v. Latimer*, 12 Tex. 438: Action on two notes payable in *cash notes*. The court charged the jury that if "cash notes at the time the notes sued on were due were the circulating medium of the country, and were generally the medium of trade, they thereby took the place of money and were to be considered its equivalent, provided the same value was attached to them by the community generally. Held not error. The proper criterion of the value of "cash notes" is not the price at which they were purchasable at the time in cash, but the value at which they were used in the ordinary and general transactions of trade by the community.

A draft payable in Arkansas money held not a bill of exchange. *Hawkins v. Watkins*, 5 Ark. 481. Nor will debt lie on a note payable in North Carolina bank notes. *Derberry v. Darnell*, 5 Yerg. 451. Bank notes are treated as depreciated currency. *Gamble v. Hatton*, Peck, 130; *Kirkpatrick v. McCullough*, 3 Humph. 171. So current bank notes. A note payable in current bankable funds, though given dur-

<sup>1</sup> *McKiel v. Porter*, 4 Ark. 584; *Elliott v. Chilton*, 5 id. 181.

the counter where they are issued and pass at par in the ordinary transactions of the country.<sup>1</sup>

§ 560. **Re-exchange and damages on bills dishonored.** A bill of exchange, as its name imports, is generally to [164] exchange a debt or credit due in one place or country for a debt or credit due in another place or country. Therefore, the drawers and indorsers are respectively liable thereon to the holder for all damages sustained by him in consequence of its dishonor.<sup>2</sup> Among them is to be included a sum sufficient to cover the premium necessary to be paid in re-exchange,<sup>3</sup> for the engagement of the drawer and indorser of

ing the ascendancy of the confederacy for confederate money, held good for its face value in United States currency. *Taylor v. Turley*, 33 Md. 500. And so in *Williams v. Moseley*, 2 Fla. 304, it was held that a note payable in "current Florida money" is payable in good funds. A note payable in United States six per cent. interest-bearing bonds is not a promissory note. *Easton v. Hyde*, 13 Minn. 90. Nor is a note payable in commonwealth bank notes. *Mitchell v. Waring*, 4 J. J. Marsh. 233.

The holder of a check payable in *current funds* may demand current money par funds, money circulating without any discount, and cannot be compelled to take depreciated bank notes. *Mare v. Kupfer*, 34 Ill. 286; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; *Klauber v. Biggerstaff*, 47 Wis. 551. A certificate of deposit payable in "currency" is not negotiable. *Huse v. Hamblin*, 29 Iowa, 501. In *Chicago F. & M. Ins. Co. v. Keiron*, 27 Ill. 501, "*Illinois currency*" received the same construction. In *Marine Bank v. Chandler*, 27 id. 325, "current bank notes" were given the same meaning. In *Marine & F. Ins. Co. v. Tincher*, 30 id. 399; and in *Swift v. Whitney*, 20 id. 144, held that currency is the

same. In *Moore v. Morris*, id. 258, that a good current money is the same. *Trowbridge v. Seaman*, 21 Ill. 101. *McCormick v. Trotter*, 10 S. & R. 94, holds that a note payable "in notes of the chartered banks of Pennsylvania" is not a negotiable note. *Confederate Note Case*, 19 Wall. 548, in "dollars," in a transaction occurring in insurgent states during the war, there was a latent ambiguity. Parol evidence might show to what currency it referred. A general deposit of the bills of the bank receiving it must be repaid at the nominal amount, although current at only one-half their amount at the time of the deposit. *Bank of Ky. v. Wister*, 2 Pet. 318. *State v. Cassel*, 2 Har. & G. 407, bank notes considered as money, and larceny graduated by their nominal value.

<sup>1</sup>*Id.*; *Pierson v. Wallace*, 7 Ark. 282; *Bizzell v. Brewer*, 9 id. 58. See *Bush v. Canfield*, 2 Conn. 485.

It was held in *Edwards v. Morris*, 1 Ohio, 239, that an obligation to pay in the notes of a specified bank must be paid in the notes of that bank or their numerical value in money. Their price in money cannot be substituted.

<sup>2</sup>*Edwards on Bills*, \*730.

<sup>3</sup>*Id.*



every bill is that it shall be paid at the proper time and place; and, if it be not so paid, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.<sup>1</sup> His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and brokers' commission, and the current rate of exchange at the place where the bill was to be demanded or payable, or the place where it was drawn or negotiated.<sup>2</sup>

Hence re-exchange is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up. The amount depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he is liable to pay it.<sup>3</sup> Where a re-exchange bill is drawn, the payment of it fulfills the drawer's or indorser's engagement of indemnity; if not, the holder may sue on the original bill, and will be entitled to recover what the drawer or indorser ought to have paid; that is to say, the amount of the re-[165] exchange bill. This is the amount whether such a bill be in fact drawn or not.<sup>4</sup>

<sup>1</sup> 3 Kent's Com. 115.

<sup>2</sup> Id.

If a bank owning and holding a foreign bill remits it for collection to a correspondent abroad, and it is protested for non-payment, the latter cannot recover damages against the former on account of the protest, though the bank had failed before the protest was made and was then indebted to its correspondent. *Ham-bro v. Casey*, 110 U. S. 216.

<sup>3</sup> Chitty on Bills, 684.

<sup>4</sup> *Suse v. Pompe*, 8 C. B. (N. S.)

537. In this case it is explained that the course of business as to the sale and purchase of foreign bills is as follows: When a London merchant has to receive money from a correspondent abroad, he instructs his bill-broker to sell an amount of florins (or whatever is the current coin of the country on which the bills are to be drawn) sufficient at the current rate of exchange to raise the amount in sterling money which he has to

**§ 561. Same subject.** The doctrine of re-exchange [166] is founded upon equitable principles. A bill is drawn, for example, in this country, payable in Paris, France. The

receive. The rate of exchange is constantly varying; but usually the fluctuations do not amount to much. As soon as the seller (the merchant) knows at what rate of exchange the bills have been sold, he draws them in florins or other foreign money; and then the bills simply entitle the buyer of them to receive so many florins (or as the case may be), and they contain no allusion whatever to the amount of sterling money paid for them. Inasmuch, however, as there is no rate of exchange for foreign bills at Liverpool, or other places in the interior, and as, by reason of the fluctuations in the rate of exchange, merchants at these places do not know at what rate their bills will be sold in London, they are unable to draw them in foreign coin, it is usual to draw such bills in sterling money, but "payable at the exchange as per indorsement." The London correspondent, when he has sold the bill, and knows the amount of foreign money which the buyer is to have, indorses them payable at the agreed rate of exchange; and then the bills are practically turned into bills payable in foreign money. The action was brought by the indorsee against the indorser of two drafts similar in form, one of which was as follows:

"Liverpool, 21 Feb. 1859. For £750 stg. Four months after date pay this, our first of exchange (second and third not paid), to the order of ourselves, the sum of seven hundred and fifty pounds sterling, at the exchange as per indorsement, value in ourselves, and place to account as per advice from

"E. BUSCH & CO.

"To Carl Von Thornton, Vienna."

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(Second and third of the same date and tenor.)

The following is a copy of the memoranda and indorsements on the second of the set:

"In need with Messrs. F. H. Hametz & Co. First for acceptance with M. G. Molle, 580 Jaquerielle. Pay Messrs. Wilh, Bunge & Co. or order, value in account.

"E. BUSCH & CO.

"Pay Messrs. Suse & Sebeth, or order, at the exchange of eleven guilders, five cents, new Austrian currency, per pound sterling, value of the same. London, 22d March, 1859.

"Pay to the order of Messrs. Kendler & Co. value in account.

"SUSE & SEBETH."

The bills were accepted but protested for non-payment. The particulars of the plaintiffs' claim under the money counts were for sums paid for the draft at its inception and protest charges, as follows:

"Messrs. Wilhelm, Bunge & Co. :

£750 0 0 } Bought 22d March.  
£490 11 0 }

	£	s.	d.
Paid March 25th, 1859	1,240	11	0
Interest to June, 5 per cent.....	16	16	5
Brokerage, 1 per cent.		15	10
Protest charges fl. 3.82			
And.....			3.82
	Fl. 7.64		
At fl. 14.5		10	6
Postages.....		5	4
		1,258	18 1 "

The defendants insisted that they were only liable for the value in sterling money in florins, 13,708.7c,

payee gives a premium for it under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now, the payee [167] and holder is entitled to the amount of the bill in Paris.

on the day the bills became due, with interest and expenses, which at the then rate of exchange would be 952*l.* 12*s.* 9*d.*, and this latter sum having been paid into court, the amount in dispute between the parties was 306*l.* 5*s.* 4*d.* The plaintiffs' claim was that the holder had the option of demanding back the sum they paid for the purchase of the bills, or of having recourse to the *recambio* account, whichever they should find most to their advantage.

Byles, J.: "The main question in this case is this: When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's non-payment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid into court. The plaintiffs, on the other hand, contend that he (the holder) is entitled, at his option, either to the amount that he gave for the bill in England, or to the re-exchange. The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser that, if the drawee shall not at maturity pay the bill, he (the indorser) will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America. Story on Bills, 107. Apply this contract to the present case. The holders are entitled to receive a certain number of Austrian florins in Vienna on the day

when the bill is at maturity. They have, in effect, bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on non-payment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna, on that day, to purchase as many Austrian florins as they ought to have received from the drawee, and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorsers in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin '*recambium*,' in Italian '*recambio*,' in French '*rechange*,' and in English *re-exchange*. The bill itself is called in French '*retraito*.' This bill for re-exchange being negotiated at Vienna puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee. . . . If the indorser were held liable for the amount which the indorsee gave for the bill, when the amount is more than the indorsee ought to have paid, the contract of the indorser would be extended; he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making of the contract. For a portion of

The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying him, at Paris, the principal, with costs and charges; or by paying him in this country those sums, together with the difference in value between the whole

these damages the holder must have sustained, though the contract had been performed by the drawee paying the bill."

The statement and illustration of the nature of the transaction which gives rise to the question of exchange and re-exchange by counsel, in *De Tastet v. Baring*, 11 East, 265, has been often quoted as apt and comprehensive: "A merchant in *London* draws on his debtor in *Lisbon* a bill in favor of another for so much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or less demand there may be in the *London* market for bills on *Lisbon*, and the facilities of obtaining them: the difference of that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustains is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum that it will cost him to replace the amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for re-

exchange. And it is quite immaterial whether he in fact redraws such a bill on *London* and raises the money upon it in the *Lisbon* market; his loss by the dishonor of the *London* bill is exactly the same, and cannot depend on the circumstance whether he repays himself immediately by redrawing for the amount of the former bill, with the addition of the charges upon it, including the amount of re-exchange, if unfavorable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference; for as soon as the bill was dishonored the holder was entitled to redraw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange afterwards; for, as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to *England* before he redrew, so neither could the party here fairly insist on having the advantage if the exchange happened to be more favorable when the bill was actually drawn. Where re-exchange has been recovered on the dishonor of a foreign bill, it has not been usual to prove that in fact another bill was redrawn."

See *Bank of U. S. v. United States*, 2 How. 711; *Crawford v. Branch Bank*, 6 Ala. 15; *Mellish v. Simeon*, 2 H. Bl. 378; also, *Grimshaw v. Bender*, 6 Mass. 157.



[168] sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country, which would sell at Paris for the sum claimed.<sup>1</sup> The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the two countries where the bill is drawn and where it is made payable. Having engaged, as drawer or indorser of the bill, that it should be paid at the place on which it is drawn, he is bound to indemnify the holder for the loss sustained by him in consequence of the non-payment.<sup>2</sup> He must pay re-exchange according to the course of exchange between the countries through which the bill was actually negotiated.<sup>3</sup> It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such permission is implied by the drawer issuing a negotiable instrument, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder being entitled, in case of its dishonor, to redraw on any previous indorser in order to make good his recourse against the indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be [169] liable for the accumulated re-exchange arising on the successive redrafts, because that results from the negotiability of the document which he has issued.<sup>4</sup>

The acceptor by his acceptance binds himself to pay the bill, and as to its contents his undertaking is the same as though he had made his note for the specified sum. He is not bound by his acceptance beyond that, and is, therefore, not liable to the holder for re-exchange. The authorities are not numerous.<sup>5</sup> Gibson, C. J., thought it a little remarkable that in so commercial a country as America the point had not been raised before; and not less so that it was first decided in England so late as

<sup>1</sup> Bank of U. S. v. United States, 2 How. 711.

<sup>2</sup> Edwards on Bills, \*734; 2 Daniel on Neg. Inst., p. 396.

<sup>3</sup> Mellish v. Simeon, 2 H. Bl. 378.

<sup>4</sup> Thomson on Bills, 445. But see Story on Bills, § 402.

<sup>5</sup> Watt v. Riddle, 8 Watts, 545; Trammell v. Hudmon, 56 Ala. 235.

1810, and with so little remark as to the principle of the decision. It came up on a motion to direct that the master allow the expense of re-exchange in a judgment against the defendant as an acceptor; to which the court barely answered that it could not be done against one who charged himself by his acceptance with no more than a liability to pay according to the law of his country; and that if he do not, the holder has his remedy against the drawer.<sup>1</sup> It has, however, been supposed, in view of certain decisions, that the acceptor is not exempt from the payment of re-exchange, when sued by the drawer after the draft has been returned protested to him and he has paid such damages.<sup>2</sup> If the acceptor by force of his ac- [170] ceptance is liable to the drawer after the latter has been com-

<sup>1</sup> *Napier v. Schneider*, 12 East, 420. See *Woolsey v. Crawford*, 2 Camp. 445; *Bowen v. Stoddard*, 10 Met. 375; *Newman v. Goza*, 2 La. Ann. 642; *Hanrick v. Farmers' Bank*, 8 Port. 539; *Dawson v. Morgan*, 9 B. & C. 618; *Van Arsdale v. Boardman*, 3 How. Pr. 60; *King v. Phillips*, Pet. C. C. 350; *Armstrong v. Brown*, 1 Wash. C. C. 43, 321; *Watt v. Riddle*, 8 Watts, 545; *Bain v. Ackworth*, 1 S. C. Const. 107; *Sibely v. Tutt*, 1 McMull. Eq. 320; *Edwards on Bills*, 733; *Chitty on Bills*, \*686.

In *Woosley v. Crawford*, 2 Camp. 445, an action by the payee against the acceptor, it was contended on behalf of the plaintiff that the defendant was answerable for all the damage that had been suffered by the plaintiff from the bill being dishonored. Lord Ellenborough answered: "You may as well state that by reason of the bill not being paid the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and in-

terest according to the legal rate of interest where it is due."

<sup>2</sup> *Bayley on Bills*, p. 656, note: "It seems reasonable that the acceptor should be liable to all parties where he has effects, and to all excepting the drawer where he has not."

Mr. Parsons (1 Notes & B. 650) says: "The acceptor, it is said, is not liable for re-exchange, as he is bound only for the sum he promises to pay with legal interest. But for this he is bound to the holder; and also to the drawer if he pays the bill. And if the default of the acceptor compels the drawer to pay this bill, and these damages with it, it would seem on general principles that the drawer's claim on the acceptor should cover the whole amount."

Mr. Daniel (*Neg. Inst.*, § 1450) says: "Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer

pelled to pay re-exchange, to avoid circuitry he ought to be liable directly to the holder, who is entitled to recourse for it; but no case has yet occurred in which a claim of this kind has been sustained against the acceptor except in behalf of the drawer. And in the principal cases in which the drawer has been allowed to recover re-exchange from the acceptor, the obligation to pay such re-exchange has grown out of the special facts of the case;<sup>1</sup> as where money has been advanced for the acceptor at the place where the bills were drawn, and he had authorized his creditor to there draw for his reimbursement. On such facts, the debtor, as such, is under a legal obligation to replace the money at the place where it was advanced; [171] and any necessary loss on bills which he directs to be drawn, on account of the difference of exchange, is justly chargeable to him.<sup>2</sup> The latest decisions in England expressly affirm the liability of an acceptor to the drawer for re-exchange, or fixed damages in lieu thereof, as the natural and proximate consequence of the breach of his contract as acceptor.<sup>3</sup> This liability is not affected by the bills of exchange

and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues the drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions. And as Thomson has well said: 'If the drawer or indorser is liable to such damage to the holder, there seems to be no reason why the

acceptor, who is immediately bound to him, should not also be liable for this direct consequence of his breach of contract.'" Thomson on Bills, 447.

<sup>1</sup> Bowen v. Stoddard, 10 Met. 375.

<sup>2</sup> Lanusse v. Barker, 3 Wheat. 101; Consequa v. Fanning, 3 Johns. Ch. 587; Coolidge v. Poor, 15 Mass. 427; Boyle v. Zacharie, 6 Pet. 635; Riggs v. Lindsay, 7 Cranch, 500; Francis v. Rucker, 2 Amb. 672; Walker v. Hamilton, 1 De G., F. & J. 602.

<sup>3</sup> In re General South American Co., 7 Ch. Div. 637; In re Gillespie, 16 Q. B. Div. 702; affirmed, 18 id. 286; Prehn v. Royal Bank of England, L. R. 5 Exch. 92; Walker v. Hamilton, 1 De G., F. & J. 602.

In Prehn v. Royal Bank, *supra*, the defendants, bankers at Liverpool, undertook to accept the drafts of plaintiffs, merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in

act.<sup>1</sup> It is limited, however, to the amount due on the bill at the time it is dishonored.<sup>2</sup>

§ 562. When re-exchange or damages not recoverable. Re-exchange is not allowed on promissory notes. Where, [172]

funds to meet the bills at maturity, and the defendants receiving one-half per cent. for the accommodation. Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank had stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying two and one-half per cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expenses in telegraphic communications between those places. The decision was that the acceptors of the bills were liable for the commission and the notarial and telegraphic expenses which the drawers had incurred.

In *Walker v. Hamilton*, *supra*, the bills were drawn by a factor in Louisiana on his principals in England, by their direction, to cover his advances and commissions; they were protested after acceptance, and the drawer had taken them up and paid 10l. per cent. damages according to the laws of Louisiana. The Lord Chancellor (Campbell) said: "I am clearly of opinion that Mr. Hamilton had a right to prove for this 10l. per cent. under the deed. It would be a great injustice if he had not. He is employed by (the acceptors) to buy goods for them upon commission, to send these goods to Liverpool, in the

United Kingdom, and he is desired by them to draw bills upon them for the price of the goods and commissions, which they undertake to accept and pay. He does buy the goods; he does draw the bills. The bills are accepted, and when due are dishonored: and then what is the situation of Mr. Hamilton? He is sued and obliged to pay the amount of 10l. per cent. in consequence of a law subsisting in Louisiana. As the case was ingeniously put by Mr. Robinson, they asked him to be their surety, and he became their surety by drawing the bills, and in that character was called on to pay. But a surety has a right against his principals to be recouped what he has paid as surety at their request. Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken; the payment of the 10l. per cent. was the natural and direct consequence of that breach of contract, and therefore the party to whom that promise was made, and who suffered from that breach of the promise, is very ill-used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

"This reasoning, I think, applies

<sup>1</sup>In *re Gillespie*, 16 Q. B. Div. 702.

<sup>2</sup>In *re Gillespie*, 18 Q. B. Div. 286. See next section and notes.



however, the maker of a note or other debtor has failed to pay money in the country where it was payable, and is sued on his contract in another country, he is probably liable not only

generally to the drawer of a bill in a foreign country, or an acceptor in another foreign country, where there may be a re-exchange, or some law giving a fixed sum in payment of exchange; because what is paid under that law, in lieu of re-exchange, is a necessary consequence of the breach of the contract on the part of the acceptor of the bill; and I have no doubt that in an action at law in an English court it might be recovered on setting out the acceptance, the dishonor, and *per quod*, that the plaintiff was compelled to pay the 10*l.* per cent. to the holder of the bill. That seems to me to be the correct principle, and we have the authority of Pothier (Cont. d' Exchange, par. Dapin, pl. 117) for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon. (Code de Commerce, liv. 1, tit. 8, § 13.) We have the authority of Story, the great jurist (Story on Bills of Exchange, § 398), who gives countenance to the doctrine; and we have that which Mr. Daniel was unable to cope with, viz.: the express authority of an English court of justice in the case of Francis v. Rucker, 2 Amb. 672, which is expressly in point with the present. It was a case that was well considered by Lord Camden, who so felt the great importance of it that in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed so that his opinion might be reviewed, and the opinion of the house of lords, if necessary, taken upon it. His decision, however, was not appealed against. It has, I believe,

been considered law ever since, and is, in my opinion, consistent with reason and good sense.

"If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but notwithstanding all the diligence which has been exercised by Mr. Daniel and his learned junior, they have brought no single authority that conflicts with that case; because in *Ex parte Moore*, 2 Bro. Ch. 597, the proof was allowed; some observations were made by Lord Thurlow respecting *Francis v. Rucker*, but he acquiesced in it, and the proof was allowed. In *Napier v. Schneider*, 12 East, 420, a gentleman at the bar asked for a reference to the master as to the amount that was due on a bill of exchange and for re-exchange (not 10*l.* or 20*l.* per cent. or any given percentage), and the court held that the master was not competent to enter into all this calculation. But if it had been a fixed sum of 10*l.* per cent. the master would have had no difficulty; and I am inclined to believe that in such a case the counsel who made the application would have succeeded instead of failing. The case of *Woolsey v. Crawford*, 2 Camp. 445, is at most a *nisi prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained; and as to this *nisi prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*. But the case before us is distinguishable from it, because it is only there said that a claim

to the par of exchange in the money of the forum, but to damages equal to the rate of exchange for obliging the [173] creditor to receive payment at the place of recovery, instead of at the place appointed in the contract for payment.<sup>1</sup> This liability does not depend on any rule applicable exclusively to commercial paper. Promissory notes may be drawn with an express provision that they are to be paid with exchange on a certain place.<sup>2</sup>

Where after protest a bill is paid by the acceptor in the country where according to its tenor it was payable, no exchange can be claimed by the holder against a prior indorser or drawer. It is only where the bill is returned home, and there taken up, that this allowance can be demanded. For the injury occasioned by the delay of payment the law deems the interest an equivalent.<sup>3</sup> And where damages are given in lieu of re-exchange, as by the commercial usage of Massachusetts, and as is now the case by express provisions of the statutes of many states, the same principle of exemption applies.<sup>4</sup> The payment of one of a set of bills is a payment of all,

in respect to re-exchange could not be admitted, and here we are not upon re-exchange, but upon a liquidated sum of 10% per cent. I do not, therefore, find any authority at all to conflict with the case of *Francis v. Rucker*, and upon that I think we may safely decide in favor of this demand."

Lord Justice Turner said: "I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but as between the drawer and the acceptor, in my opinion, there is a liability in the acceptors which would have been provable under a bankruptcy. Therefore the case of *Francis v. Rucker* is distinct upon this point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect

of the case at law may be, as between the holder and the acceptor, they do not, in my judgment, affect the case as between the drawer and the acceptor; and in my opinion, therefore, our answer must be in the affirmative."

<sup>1</sup> *Grant v. Healey*, 3 Sumn. 523; *Scott v. Bevan*, 2 B. & Ad. 98; *Cash v. Kennion*, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167; *Bank of Missouri v. Wright*, 10 Mo. 719; *Lee v. Wilcocks*, 5 S. & R. 48; 1 *Parsons on N. & B.* 664; *Edwards on Bills*, \*726.

<sup>2</sup> *Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Woulluisse*, 2 McLean, 581; *Smith v. Kendall*, 9 Mich. 241; *Leggett v. Jones*, 10 Wis. 34. But see *Atkinson v. Manks*, 1 Cow. 707.

<sup>3</sup> *Bangor Bank v. Hook*, 5 Me. 174; *Porter v. Ingraham*, 10 Mass. 88; *Bayley on Bills*, 387.

<sup>4</sup> *Bangor Bank v. Hook*, 5 Me. 174; *Page v. Warner*, 4 Cal. 395.

and a waiver of damages which may have accrued on prior [174] protest of another.<sup>1</sup> If the bill is on presentation paid in part and protested for the residue, the re-exchange is confined to the unpaid part, or the damage is apportioned thereto.<sup>2</sup> And if paid in part by the acceptor after protest, the damages or claim for re-exchange is discharged *pro tanto*. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion which would otherwise attach to it ceases.<sup>3</sup> Collection of the bills from the acceptor by execution has the same effect as payment by him. Nor will this effect be avoided by the fact that the former action against him was not in the name of the plaintiff if it was for his benefit.<sup>4</sup>

These damages are allowed only to the parties on whose account and risk the remittance is made. Parties receiving a bill as conditional payment of an antecedent debt, and not in

<sup>1</sup> Id.

<sup>2</sup> In re Gillespie, 18 Q. B. Div. 286; Laing v. Barclay, 3 Stark. 38.

<sup>3</sup> Bangor Bank v. Hook, 5 Me. 174.

<sup>4</sup> Warren v. Coombs, 20 Me. 139.

In New York, by the former rule of damages on bills, the holder of a bill on London returned protested for non-payment was entitled to recover from the drawer or indorser there the contents of the bill at the *rate of exchange* at the time of the notice of dishonor, with twenty per cent. damages and interest. Graves v. Dash, 12 Johns. 17 (reversing Hendricks v. Franklin, 4 id. 119); Denston v. Henderson, 13 id. 322. And the same rule was applied when the protest was for non-acceptance. United States v. Barker, 1 Paine, 156. But in Pennsylvania the recovery on non-acceptance was only of interest from the time of protest. Taan v. Le Gaux, 1 Yeates, 204; Morris v. Tarin, 1 Dall. 147.

In Hargous v. Lahens, 3 Sandf. 213, the bill in question was drawn in New York on parties in France, and after acceptance was protested for

non-payment. Notwithstanding a subsequent part payment by the acceptor, it was held that the damages by the law of New York on the whole bill were recoverable from the drawers. The holder's right to recover from them, it was held, became perfect on the return of the draft, and a subsequent part payment had no influence in reducing that fixed and determinate liability. After being so returned, if the bill be sent back to the place of payment, and a partial payment thereon is then made by the acceptor, a tender of the balance due upon the face of the bill is defective if accompanied by the condition that the bill be delivered up without payment or offer to pay the damages. The holders are entitled to retain the bill to enforce their claims for damages against the proper party. He is entitled to his damages on non-payment, irrespective of the place where he may subsequently receive entire or partial payment. See De Rham v. Grove, 18 Abb. 43.

satisfaction of it, are not entitled to damages.<sup>1</sup> If bills are drawn by a party who has no purpose to transfer funds to a foreign country, nor to have the amount they represent employed there, but for the object of having such amount remitted to the country in which they are drawn, re-exchange is not recoverable.<sup>2</sup>

§ 563. **By what law liabilities governed.** The con- [175] tracts of the several parties to a bill, as well as to a note, are governed by the laws of the place where they are severally made. Those of the maker and acceptor may be modified by expressly appointing a different place of payment. But the contract of the drawer and indorsers is implied, and they are presumed to contract with reference to the law of the place where the instrument is drawn or indorsed, for that is also the place where their several contracts are to be performed.<sup>3</sup> It must therefore often occur that the measure of damages will be different as to the several parties. The liability of the drawer will be governed by the law of the place where

<sup>1</sup>Chapman v. Steinmetz, 1 Dall. 261; Keppele v. Carr, 4 id. 155. In this case Shippen, J., said: "It appears . . . to be settled law that where a bill of exchange is not paid and received in satisfaction of a debt due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor, who remits it for acceptance and payment, stands on the footing of an agent only until the bill is actually paid. Then, in point of justice, it seems but fair to allow every incidental or casual profit and emolument to the party who is exposed to all the hazard and inconvenience of the remittance. . . . He is entitled to damages on whose account and risk the bill is remitted." Watts v. Willing, 2 Dall. 100; Evans v. Smith, 4 Bin. 366; Dehers v. Harriot, 1 Showers, 163; Brown v. Jackson, 1 Wash. C. C. 512; Hopkins v. Kenworthy, 3 Johns. Cas. 436; Thompson v. Robertson, 4 Johns. 27.

<sup>2</sup>Williams v. Ayers, 3 App. Cas. 133; S. C., 24 Moak, 82.

<sup>3</sup>In re Commercial Bank of South Australia, 36 Ch. Div. 522, 526; Allen v. Kemble, 6 Moore, P. C. 314; Gibbs v. Fremont, 9 Exch. 25; Freese v. Brownell, 35 N. J. L. 285; Bank of U. S. v. United States, 2 How. 711; Hunt v. Standart, 15 Ind. 33; Lennig v. Ralston, 23 Pa. St. 137; Price v. Page, 24 Mo. 67; Page v. Page, 24 Mo. 596; Bouldin v. Page, id. 595; Kuenzi v. Elvers, 14 La. Ann. 391; Raymond v. Holmes, 11 Tex. 54; Everett v. Vendryes, 19 N. Y. 436; Slocum v. Pomroy, 6 Cranch, 221; Cook v. Litchfield, 9 N. Y. 279; S. C., 5 Sandf. 330; Dow v. Rowell, 12 N. H. 49; Aymar v. Sheldon, 12 Wend. 443; Yeatman v. Cullen, 5 Blackf. 246; National Bank v. Green, 33 Iowa, 140; Trabue v. Short, 18 La. Ann. 257; Short v. Trabue, 4 Met. (Ky.) 299; Dundas v. Bowler, 3 McLean, 400; Williams v. Wade, 1 Met. 82; Artisans' Bank v. Park Bank, 41 Barb. 602.



the bill is drawn, among other things in respect to interest and exchange, or damages in lieu of it, and each of several successive indorsers may contract several and different liabilities, each being bound according to the law of the place where his indorsement is made.<sup>1</sup> Re-exchange varies with the fluctuations of commercial intercourse, influenced somewhat by [176] local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, it has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the states of the Union have by legislation or commercial usage substituted a certain amount of damages on protested foreign bills in lieu of re-exchange.<sup>2</sup> Chief Justice Parsons<sup>3</sup> said: "According to the law merchant, uncontrolled by any local usage, the holder is entitled to recover the face of the bill, and the charges of the protest, with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the bill which it is here the usage to pay. But the rule of damages established by the law merchant is, in our opinion, absolutely controlled by the immemorial usage in this state. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms part of the law merchant of the commonwealth. Courts of law have always recognized it, and juries have been instructed to govern themselves by it in finding their verdicts. . . . The origin of this usage was probably

<sup>1</sup> 1 Daniel on Neg. Inst., p. 683.

How. 711; Lennig v. Ralston, 23 Pa.

<sup>2</sup> Bank of U. S. v. United States, 2 St. 137.

<sup>3</sup> Grimshaw v. Bender, 6 Mass. 157.

founded in the convenience of avoiding all disputes about the price of re-exchange, and to induce purchasers to take the bills by a liberal substitution of ten per cent. instead of a claim for re-exchange.”<sup>1</sup>

<sup>1</sup> In *Hendricks v. Franklin*, 4 Johns. 119, Spencer, J., said: “The right to recover twenty per cent. damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions. In Great Britain (2 H. Bl. 378) there is no such usage, and hence there the difference of exchange is always taken into consideration, and their courts of justice allow the usual rate of re-exchange upon the protest of a foreign bill. In Pennsylvania, as early as the year 1700, the legislature enacted that if any person within that province should draw or indorse any bill of exchange upon any person in England or other parts of Europe, and the same be returned unpaid with a legal protest, the drawer and all concerned should pay the contents of the bill, together with twenty per cent. advance for the damage thereof in the same specie as the bill was drawn, or current money of that province equivalent to that which was first paid to the drawer or indorser. It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill was originally co-extensive with the rule established in Pennsylvania, and that the same reason induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such heavy damages as twenty per cent., I confess myself unable to discover them. It

certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill.”

*Morris v. Stokes*, Mart. & Hayw. 4, was a default and inquiry. The court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange) the court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

In New York the holder was entitled to recover not only the twenty per cent. damages, together with the interest and charges, but also the amount of the bill liquidated by the rate of exchange, or price of bills on England, or other places of demand in Europe, at the time of the return and notice to the party to be charged. 3 Kent's Com. 115-117; *Denston v. Henderson*, 13 Johns. 321; *Graves v. Dash*, 12 id. 16; *Hendricks v. Franklin*, 4 id. 119; *Scofield v. Day*, 20 id. 102; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Wendell v. Washington & W. Bank*, 5 Cow. 161.

*Appleton, C. J.*, in *Wood v. Watson*, 53 Me. 300 (1865), said: “Damages given on foreign bills of exchange for non-payment are as much part of the contract as interest. *Bank of U. S. v. United States*, 2 How. 711, 737. The percentage allowed by statute on the protest of a foreign bill is a commutation for in-

[177] The damages now allowed in this country are regulated generally by statutes; these establish different rates in [178] the several states, and in some instances give damages on inland bills. In a note the substance of the later statutes of nearly all of the states and territories is given.<sup>1</sup> These

terest, damage and re-exchange. It is a statutory liquidation of damages by which the parties are to be governed. *Lloyd v. McGarr*, 3 Pa. St. 482. Now mercantile usage has established the damages on bills on London, in case of dishonor in Massachusetts, as determined in *Grimshaw v. Bender*, 6 Mass. 157; and in this state, in *Snow v. Goodrich*, 14 Me. 235, at ten per cent., instead of re-exchange. This usage forms part of the law of the state. It had been of so long continuance that, in 1809, when the judgment of the court in *Grimshaw v. Bender* was pronounced, Mr. Chief Justice Parsons said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant, and as obligatory as any portion of the common law until it shall be modified or changed by the legislature. Whether the rule of damages is established by statute, or by a long-continued usage having the force of law, it is to be deemed part of the contract of indorsement. The rule referred to, not having been altered by the liquidation, must be regarded as remaining in full force. It is not for the court to change the law whenever a monetary crisis occurs." See *Bowen v. Stoddard*, 10 Met. 375.

<sup>1</sup> Alabama: Five per cent. on the amount drawn for, whether the bill be inland or foreign, or whether protested for non-acceptance or non-payment. Code, 1886, § 1771.

Arizona: Ten per cent. on the amount drawn for by any merchant

upon his non-resident agent or factor, with interest and costs of suit. R. S. 1887, ¶ 131, p. 70.

Arkansas: On protested bills drawn or negotiated in the state, if payable in the state, two per cent. If payable in Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or any point on the Ohio river, at the rate of four per cent. If payable at any other place in the United States, five per cent. If payable at any post or place beyond the limits of the United States, ten per cent. If accepted and protested for non-payment, when drawn by a person without the state and within the United States, six per cent.; and if drawn by a person without the United States, ten per cent. These damages are in addition to expense of protest, and interest at the rate of ten per cent. per annum on the amount specified in the bill. Mansfield's Dig. of Stats. 1884, §§ 466, 467, 468.

California: For interest accrued before notice of dishonor, re-exchange, expenses, and all other damages in favor of holders for value only, on non-acceptance or non-payment of any bill drawn or negotiated in the state, damages are given as follows: On bills drawn upon any person within the state, two per cent.; drawn upon any person out of the state, and in any of the United States west of the Rocky Mountains, five per cent.; drawn upon any person in any of the United States east of the Rocky Mountains, ten per cent.: drawn upon any person in a for-

have no extraterritorial effect,<sup>1</sup> and are not to be extended by construction so as to include parties not within their terms. Guarantors are not entitled to the statutory damages if the act is limited to drawers, indorsers, makers and obligors.<sup>2</sup>

eign country, fifteen per cent. upon the amount of the bill including damages; interest is allowed from the time of the dishonor. 2 Deering's Codes, §§ 3234-3236. See *Pratalongo v. Larco*, 47 Cal. 379.

Colorado: On foreign bills, or those drawn upon any person out of the state, on non-acceptance or non-payment, ten per cent. with legal interest from the time the bill ought to have been paid, and costs of protest. 1 Mills' Ann. Stats. 1891, ¶ 241, p. 491.

Connecticut: On protest of a bill of exchange drawn on a person in the city of New York, two per cent. on the principal sum; drawn on a person in the states of New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (except the city), New Jersey, Pennsylvania, Delaware, Maryland or Virginia, or in the District of Columbia, three per cent.; drawn upon a person in the states of North Carolina, South Carolina, Ohio, Illinois, Indiana, Michigan, Kentucky or Georgia, five per cent.; drawn upon a person in any other state, territory or district of the United States, eight per cent. Such damages stand in the place of interest and all other charges to the time when notice of protest is given, and demand of payment made, and such damages are to be determined without reference to the rate of exchange. Gen. Stats. 1888, § 1864.

Delaware: On bills drawn on a person beyond the seas and returned unpaid with legal protest, twenty per cent. Rev. Code (1874), p. 356, § 3.

Florida: On foreign protested bills,

five per cent. McClellan's Dig. Laws (1881), p. 839, § 123.

Georgia: On any bill, draft or order protested for non-acceptance or non-payment payable out of the state and within the United States, five per cent. on the principal in addition to interest and protest fees, for which the drawer, indorser or acceptor is liable; if payable without the limits of the United States, ten per cent. Code of 1882, §§ 2792, 2793.

Idaho: On bills drawn on any person in the state if they are protested for non-acceptance or non-payment, two per cent.; on any person out of the state but in any other of the states or territories west of the Rocky Mountains, five per cent.; on any person in the United States east of the Rocky Mountains, ten per cent.; on any person in any foreign country, fifteen per cent., and in all cases lawful interest upon the principal sum specified and the damages. R. S. 1887, §§ 3562, 3563.

Illinois: On protested bills payable without the United States the drawer or indorser is liable for the principal sum, interest, ten per cent. damages, costs and charges of protest; when payable at any place within the United States but out of the state, five per cent. in addition to principal, interest and costs of protest. 2 Starr & Curtiss' Ann. Stats., pp. 1651, 1652; R. S. 1889, p. 943.

Indiana: On protested bills drawn or negotiated within, payable out of, the state and in the United States, five per cent.; payable out of the United States, ten per cent. on the

<sup>1</sup> *Fieske v. Foster*, 10 Met. 597.

<sup>2</sup> *Woolley v. Van Volkenburgh*, 16 Kan. 20.



**[185] § 564. Stipulations for attorneys' fees and costs.**

Notes are not unfrequently drawn to include not only an in-

principal sum. Beyond such damages no interest or charges, accruing prior to protest, allowed, but interest may be recovered from the date of protest, but no damages beyond cost of protest, if upon notice of protest and demand of principal the same be paid. And a holder to recover damages must have paid value. 2 R. S. 1888, ¶¶ 5507-5511.

Iowa: On bills drawn or indorsed in the state, upon a person out of the United States or in California, Oregon or Nevada, or any of the territories, five per cent. on the principal sum, and interest on the same from the time of protest; drawn upon a person out of the state, in any other place in the United States, three per cent. with interest. 1 McClain's Ann. Code (1888), § 3273.

Kansas: On all bonds, notes and bills negotiable by the act, drawn for the payment of any sum of money legally protested for non-acceptance or non-payment, the drawer or drawers, indorser or indorsers, maker or makers, obligor or obligors, shall be subject to the payment of six per cent. damages, if drawn upon any person within or without the jurisdiction of the United States and beyond the limits of the state; and interest at the rate of seven per cent. from the date of protest until paid, unless a different rate is stipulated in such bill, note or bond; but no person residing within the state is liable for protest damages. 1 Gen. Stats. 1889, ¶ 490, p. 187. See *Cramer v. Eagle Manuf. Co.*, 23 Kan. 399; *Wooley v. Van Volkenburgh*, 16 id. 20; *Knowles v. Armstrong*, 15 id. 371; *German v. Ritchie*, 9 id. 106; *Noyes v. White*, id. 640.

Kentucky: Bills drawn on any

person out of the United States, and protested for non-payment or non-acceptance, bear ten per cent. per annum interest from the day of protest, for not longer than eighteen months, unless payment be sooner demanded from the party to be charged, or unless by the contract a rate greater than six per cent. is stipulated for. Such interest shall be recovered to the time of the judgment, and the judgment bears six per cent. interest. Gen. Stats. 1881, p. 250, § 10.

Louisiana: The rate of damages to be allowed upon the usual protest for non-acceptance or non-payment of bills of exchange drawn or negotiated in the state is, on bills drawn on and payable in foreign countries, ten per cent.; on all bills drawn on and payable in any other state in the United States, five per cent. on the principal sum specified in such bill. Damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-acceptance or non-payment, but the holder is entitled to recover lawful interest upon the aggregate amount of the principal sum, and of the damages thereon from the time at which notice of protest for non-acceptance or non-payment shall have been given and payment demanded. When the contents of the bill are expressed in the money of the United States, the amount of the principal and of the damage is ascertained without any reference to the rate of exchange; but when expressed in foreign currency the principal and damages are determined by the rate of exchange; but when the value of such foreign coin is fixed by the laws

creased rate of interest, in case of default at maturity, [186] but also attorney fees. These stipulations in notes, as well as

of the United States, the value thus fixed must prevail. Voorhies' Rev. Laws (1884), §§ 320-323.

Maine: Damages on protest of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer or indorser of one in the state, are, if payable at a place seventy-five miles distant, one per cent.; if payable in the state of New York, or in any state northerly of it and not in this state, three per cent.; if payable in any Atlantic state or territory southerly of New York and northerly of Florida, six per cent.; and in any other state or territory, nine per cent. R. S. 1883, p. 700, § 42.

Maryland: The holder of a bill of exchange, drawn in the state, on any person in a foreign country, regularly protested, is entitled to recover so much current money as will purchase a good bill of exchange of the same time of payment and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum, with costs of protest and legal interest; if drawn on any person in any other of the United States and protested, the holder may recover in the same way a sum sufficient to buy another bill of the same tenor, and eight per cent. damages on the principal sum, and interest from the time of protest and costs. It is also provided that indorsers of such bills, who shall have paid the principal and the damages prescribed by statute, may recover the same with interest from the drawer, or any other person liable to him on the bill. 1 Public Gen. Laws (1888), pp. 113, 114. The indorser of a bill, remitted to his original char-

acter as holder and payee, cannot recover under the last section of this statute, but only as holder. Bank of U. S. v. United States, 2 How. 711; 1 Parsons on N. & B. 657-8, note.

Massachusetts: The holders of bills drawn or indorsed in the state and payable without the United States, duly protested for non-acceptance or non-payment, are entitled to the current rate of exchange at the time of the demand, and five per cent. on the contents thereof, and interest on the contents from the date of the protest. The amount of contents, damages and interest are in full of all damages, charges and expenses in the above cases. If the bill is payable within the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut or New York, two per cent.; New Jersey, Pennsylvania, Maryland or Delaware, three per cent.; Virginia, West Virginia, North Carolina, South Carolina or Georgia, or the District of Columbia, four per cent.; if in any other of the United States or the territories thereof, five per cent. If the bill is for a sum not less than one hundred dollars, and payable within the state at a place not less than seventy-five miles from the place where drawn or indorsed, one per cent. in addition to the contents thereof, and interest on the contents. Public Stats. 1882, p. 428, §§ 18, 20, 21.

Michigan: Damages on bills duly protested, in addition to the contents of the bill and interest and costs: On bills payable at any place without the state, but within Wisconsin, Illinois, Indiana, Pennsylvania, Ohio or New York, three per cent. on the contents of the bill; if payable within either of the states of Mis-

in mortgages, have been the subject of some judicial discussion and conflict of decision. In Illinois it is held that a stip-

souri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia or the District of Columbia, five per cent.; and if payable elsewhere within any of the United States or the territories thereof, ten per cent. If the bill is payable without the limits of the [182] United States the holder may recover the same, with the current rate of exchange at the time of the demand, and damages at the rate of five per cent. upon the contents thereof, together with interest on said contents from the date of protest; said sum to be in full of damages, charges and expenses. 1 How. Stats. (1882), §§ 1584, 1585.

Minnesota: Damages on protested bills payable without the limits of the United States are the bills with the current rate of exchange at the time of the demand and ten per cent. on the contents, with interest thereon from the time of protest, to be in full of all damages, charges and expenses. If the bill is drawn on any person in the United States but out of the state, five per cent. damages, together with costs and charges of protest, besides the amount of the bill and legal interest. 1 Stats. of 1891, §§ 2107, 2108.

Mississippi: Damages on bills drawn on any person out of the state but within the United States, five per cent. on the amount, besides interest on the same; out of the United States, ten per cent., besides interest, and the holder is also entitled to all costs and charges. No damages on domestic bills. Ann. Code (1892), ¶¶ 3506, 3507.

Missouri: When any bill of exchange, expressed to be for value

received, drawn and negotiated within the state, is duly presented for acceptance or payment, and protested for non-acceptance or non-payment, the drawer and indorsers, having due notice of the dishonor, are required to pay damages as follows: If drawn on any person at any place within the state, four per cent. on the principal sum. If drawn on any person out of the state but within the United States or the territories, ten per cent. If drawn on any person without the United States or the territories thereof, twenty per cent. If accepted and not paid, the damages allowed are four per cent., if drawn by any person within the state; if drawn by any person without the state but within the United States, damages are allowed at the rate of ten per cent.; if drawn without the United States, at the rate of twenty per cent. The damages can be recovered only by the holder of a bill who has paid a valuable consideration for it or for some interest in it. If payment is made of a bill, with the interest and protest charges, drawn within the state on any person at a place in it, within twenty days after demand, no damages are recoverable. If a bill is expressed to be paid in the money of the United States, the amount due and damages are to be determined without reference to the rate of exchange between this state and the place on which it is drawn; if in the money or currency of any foreign country, then the amount due, exclusive of damages, is to be ascertained by the rate of exchange, or the value of such foreign currency at the time of payment. 1 R. S. 1889, §§ 725, 726, 728, 729, 731, 732.

ulation to pay a specified sum as an attorney fee, if the note be not paid *without suit*, is not recoverable in the suit on the

Nebraska: The drawer or drawers, indorser or indorsers are liable on bills legally protested for non-acceptance or non-payment to twelve per cent. damages thereon, if drawn upon any person without the United States, and six per cent. damages if drawn upon any person within the United States and without the state. Comp. Stats. (1889), p. 522, § 7.

Nevada: Bills drawn upon any person in any of the United States east of the Rocky Mountains, fifteen per cent.; if upon a person in any foreign country, twenty per cent. Such damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder is entitled to recover lawful interest upon the principal sum specified in such bill and damages thereon from the time of giving notice of protest. If the contents of the bill are expressed in money of account of the United States the sum due thereon and the damages allowed for its non-payment shall be determined without any reference to the rule of exchange between the state and the place where the bill was drawn. If the contents be expressed in the money or currency of any foreign country, the amount due, exclusive of the damages, is ascertainable by the rate of exchange or the value of such foreign money at the time payment was demanded. The damages are recoverable only by a holder who has paid value. Gen. Stats. (1885), §§ 4892, 4896.

New Mexico: On bills drawn upon a person out of the United States, twelve per cent. upon the principal sum, with interest on the same from

the time of protest; if upon a person in any of the United States or territories thereof, six per cent., with interest. Comp. Laws (1884), § 1728.

New York: Damages on protest of bills of exchange drawn or negotiated within the state are as follows: If the bill is drawn upon any [183] person at any place in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Ohio, Delaware, Maryland or Virginia, or in the District of Columbia, three per cent. upon the amount. If it is drawn upon any person at any place in either of the states of North Carolina, South Carolina, Georgia, Kentucky or Tennessee, five per cent. If it is drawn upon any person in any other state or territory of the United States, or in any other place on or adjacent to this continent and north of the equator, or in any place in the West Indies, or elsewhere in the Western Atlantic Ocean, ten per cent. If drawn upon any person in Europe, ten per centum. Such damages to be in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder may recover, in addition to such damages, interest upon the aggregate amount of the principal sum and the damages aforesaid from the time notice of protest shall have been given and payment demanded. If the contents of the bill are expressed in the money of the United States, the amount due thereon and the aforesaid damages shall be determined without reference to the rate of exchange. If it is expressed as payable in the money or currency of a foreign country, then the amount



note because not due until after suit is commenced.<sup>1</sup> But it is held there to be recoverable if payable on default at maturity instead of on the event of bringing suit.<sup>2</sup> In Indiana such

due, exclusive of the damages aforesaid, shall be ascertained by the rate of exchange or the value of such foreign currency at the time of the demand of payment. Damages on non-acceptance are the same as aforesaid in reference to non-payment, and are in lieu of interest, charges of protest and all other charges previous to and at the time of giving notice of non-acceptance. But the holder shall be entitled to recover interest upon the aggregate amount of the principal and damages thereon from the time of protest. The damages above specified are only recoverable by the holder of a bill who shall have purchased the same, or some interest therein, for a valuable consideration. 1 Birdseye's Stats. (1889), pp. 276, 277.

North Carolina: The damages on protested bills of exchange, drawn or indorsed in the state, are as follows: For bills upon any person in any other of the United States or in any of the territories thereof, three per cent.; for bills payable in any other place in North America (excepting the northwest coast of America), or in any of the West India or Bahama Islands, ten per cent.; for bills payable in the islands of Madeira, the Canaries, the Azores, the Cape de Verde Islands, or in any other state or place in Europe or South America, fifteen per cent.; if payable in any other part of the world, twenty per cent. on the principal sum. 1 Code of 1883, § 48.

North Dakota: On bills drawn

upon any person in the state, two per cent.; on any person in the states of Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Missouri or Montana, three per cent.; on any person in any other of the United States or territories, five per cent.; on any person in any place in a foreign country, ten per cent.: and from the time of notice of dishonor and demand of payment, lawful interest upon the aggregate amount of the principal. Comp. Laws Dak., 1887, § 4560; continued in force in North Dakota by § 2, art. 20, constitution, until altered or repealed.

Ohio: No damages are allowed by statute now on bills drawn or negotiated in this state. The former statutes imposed twelve per cent. damages when any bill was legally protested for non-acceptance or non-payment, if drawn on any person without the jurisdiction of the United States; and six per cent. if drawn on any person within the jurisdiction of the United States and without the jurisdiction of that state, and such bills bore six per cent. interest from the date of the protest until paid. But no damages were allowed if there was an agreement or understanding that the bill might be paid at any other place than that on which it was drawn. Swan's R. S., Derby's ed. (1854), 576. In *Farmers' Bank v. Brainerd*, 8 Ohio, 292, a bill drawn upon a person in Ohio payable in New York, and protested for non-payment, was held not to entitle the holder to six per cent.

<sup>1</sup> *Nickerson v. Babcock*, 29 Ill. 497; *Easter v. Boyd*, 79 id. 325.

<sup>2</sup> *Id.*; *Dunn v. Rodgers*, 43 Ill. 260; *Clawson v. Munson*, 55 id. 394; *Barton v. Farmers' & Merchants' Nat. Bank*, 122 id. 352.

stipulations are maintained for reasonable amounts, and the sums so stipulated, even when payable in the event of a suit, are recoverable in that suit. They are held to be a part of

damages for protest. And in *Commercial Bank v. Reed*, 11 Ohio, 498, six per cent. damages on a protested bill addressed by mistake to the defendant in Ohio, instead of at Philadelphia, where the bill was payable, could not be recovered, nor be set off against a subsequent claim, if paid with a full knowledge of the facts.

Oklahoma: Damages are allowed as full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages, in favor of holders for value only, as follows: if drawn upon a person within the territory, two per cent.; on a person in Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Missouri or Montana, three per cent.; if drawn upon a person in any other of the states or territories, five per cent.; upon a person in a foreign country, ten per cent. From the time of notice of dishonor and demand of payment interest is recoverable upon the principal sum and the damages. If the amount of the bill is expressed in United States money, damages are to be estimated upon it without regard to the rate of exchange; if in foreign money, the estimate is to be made upon the value of a similar bill at the time of protest in the place nearest to that where the bill was negotiated and where such bills are currently sold. Stats. of 1890, pp. 713, 714.

Oregon: On bills drawn or indorsed within the state and payable out of the United States, duly protested for non-acceptance or non-payment, the party liable for the contents is also liable to pay it at the current rate of [184] exchange at the time of de-

mand and damages at ten per cent. upon its contents, with interest on the contents, in full of all demands and expenses. On bills within the United States and out of the state, the drawer or indorser is liable for five per cent. damages with legal interest and costs and charges of protest. 2 Hill's Ann. Laws (1887), §§ 3195, 3196.

Pennsylvania: The holder of bills of exchange drawn or indorsed in the state, and returned unpaid with a legal protest, may receive and recover from the drawer or indorser the damages hereafter specified, over and above the amount of the bill and the charges of protest, with interest thereon from the time of protest and notice; that is to say, if such bill shall have been drawn upon any person in any of the United States or the territories thereof, except Upper and Lower California, New Mexico and Oregon, five per cent.; for bills payable in these excepted states and territories, ten per cent.; for bills payable in China, India, or other parts of Asia, Africa, or islands in the Pacific ocean, twenty per cent.; for bills upon Mexico, the Spanish Main, West Indies, or other Atlantic islands, east coast of South America, Great Britain, or other places in Europe, ten per cent.; for bills upon places on the west coast of South America, fifteen per cent.; and for bills upon any other part of the world, ten per cent. upon such principal sum. The amount of such bill, and of the damages payable thereon, is ascertained by the rate of exchange or value of the money or currency mentioned in such bill at the time of notice of pro-

the damages which the maker stipulates to pay and may be included therein with the principal and interest of the note; they are incident to the main debt, and cannot be sued for in

test and demand of payment. 1 Purdon's Dig. (1883), p. 189, acts of 1821 and 1850. The act of 1849 allows bills to be drawn payable in particular funds with the current rate of exchange in Philadelphia or any other place in the state, and leaves the parties to specify, as they might do at common law, the rate of damages to be recovered on the bill. Dunlop's Comp. 1156-7. A bill drawn in the state and signed in blank, though sent abroad to be filled up and negotiated, is within the statute. Lennig v. Ralston, 23 Pa. St. 137. Interest is recoverable on the damages as well as on the amount of the bill. Lloyd v. McGarr, 3 id. 474, 482. See Watt v. Riddle, 8 Watts, 545.

Rhode Island: Damages on protested bills returned for non-acceptance or non-payment from any place without the United States, ten per cent., besides charges of protest. After protest, six per cent. interest. On bills drawn on parties in other states of the United States, returned under protest, five per cent., and charges of protest, besides interest from the time of protest. Pub. Stats. 1882, pp. 342, 343.

South Carolina: Damages on protested bills drawn upon persons in the United States but out of the state, ten per cent.; on all bills drawn on persons in any other portion of North America, or within any portion of the West India Islands, twelve and a half per cent.; if drawn upon any person in any other part of the world, fifteen per cent., besides the charges incidental thereto, and lawful interest until payment. R. S. 1882, § 1299.

South Dakota: Same as North

Dakota, *supra*. See ch. 105, Laws of S. D., 1890.

Tennessee: Damages on protested bills drawn on persons out of the state but within the United States, three per cent.; drawn on any person in any other state or place in North America bordering on the Gulf of Mexico, or in any of the West India Islands, fifteen per cent.; drawn on any person in any other part of the world, twenty per cent. These damages are in lieu of interest, and all other charges except charges of protest to the time when the notice of protest and demand of payment shall have been given; but interest is to be computed from that time on the aggregate of principal, damages and charges of protest. Code (1884), §§ 2720, 2721.

Texas: Damages on protested bills drawn on persons living beyond the limits of the state are ten per cent. on the amount of the bill, with interest and costs of suit. The provision is confined to drafts drawn by merchants upon their agents or factors. 1 Sayles' Stats. (1888), art. 275.

Utah: As full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, if drawn upon a person in the territory, one per cent.; if upon a person elsewhere within the United States, two and a half per cent.; if upon a person in a foreign country, five per cent. Interest may be recovered upon the principal sum and the damages from the time of notice of dishonor and demand of payment. If the amount of the bill is expressed in United States money damages are estimated upon it with-



a separate action.<sup>1</sup> The holder of a note cannot recover as attorneys' fees any sum in excess of that he has agreed to pay as such.<sup>2</sup> Such agreements are sustained in Iowa, Dakota, Minnesota, Pennsylvania, New Mexico, Louisiana, Maryland, Texas, Oregon, Mississippi and some of the federal courts.<sup>3</sup>

out regard to the rate of exchange; if in foreign money, upon the value of a similar bill at the time of protest in the place nearest to that where the bill was negotiated and where such bills are currently sold. 2 Comp. Laws (1888), §§ 2941-2945.

Virginia: Damages on protested bills, drawn or indorsed within the state and payable without the state but within the United States, three per cent.; if payable without the United States, ten per cent. Code, 1887, § 2851.

Washington: On bills protested for non-payment, drawn or indorsed within the territory, payable out of the United States, ten per cent.; and if payable out of the state, but within some state or territory of the United States, five per cent. Such damages are in lieu of interest, and all other charges incurred previous to and at the time of giving notice of non-payment, but the holder is entitled to receive lawful interest upon the principal, and damages thereon, from the time of giving notice of protest for non-payment. Code of 1891, §§ 2396, 2397.

West Virginia: Damages on protested bills, if payable out of the state and within the United States, three per cent.; if payable out of the United States, ten per cent. Code, 1884, p. 626, ¶ 9.

Wisconsin: Damages on protested bills, drawn or indorsed in the state but payable without the United States, the current rate of exchange and five per cent. on the contents, and interest on the same from the

date of protest, in full of all damages, charges and expenses. If payable out of the state, but in some state or territory of the United States, five per cent., together with charges of protest. Liability under this last clause is restricted to the drawer or indorser. 1 S. & B. Ann. Stats. (1889), §§ 1682, 1683.

<sup>1</sup> *Smiley v. Meir*, 47 Ind. 559; *Roberts v. Comer*, 41 id. 475; *Wyant v. Pottorff*, 37 id. 512; *Johnson v. Crossland*, 34 id. 334; *Matthews v. Norman*, 42 id. 176; *First Nat. Bank v. Indianapolis*, etc., 45 id. 5; *Garver v. Pontious*, 66 id. 191; *Smock v. Ripley*, 62 id. 814; *Tuley v. McClung*, 67 id. 10; *Reisterer v. Carpenter*, 124 id. 30.

<sup>2</sup> *Harvey v. Baldwin*, 124 Ind. 59; *Kennedy v. Richardson*, 70 id. 524; *Goss v. Bowen*, 104 id. 207.

<sup>3</sup> *Williams v. Meeker*, 29 Iowa, 292; *Nelson v. Everett*, id. 184 (see *Miller v. Gardner*, 49 id. 234; *Davidson v. Vorse*, 52 id. 384); *Farmers' Nat. Bank v. Rassmussen*, 1 Dak. 60; *Johnston Harvester Co. v. Clark*, 30 Minn. 308 (upon proof of value of the attorney's services and plaintiff's liability therefor); *Imler v. Imler*, 94 Pa. St. 372; *Daily v. Maitland*, 88 id. 384; *Exchange Bank v. Tuttle*, 7 L. R. A. 445 (New Mexico); *Siegel v. Drumm*, 21 La. Ann. 8; *Bowie v. Hill*, 69 Md. 433; *Miner v. Paris Exchange Bank*, 53 Texas, 559; *Hamilton Gin & Mill Co. v. Sinker*, 74 id. 51; *Peyser v. Cole*, 11 Ore. 38; *Eyrich v. Capital State Bank*, 67 Miss. 60; *Wilson Sewing M. Co. v. Moreno*, 7 Fed. Rep. 806 (*Deady, J.*); *Bank of British North*



In Oregon a provision for a stipulated sum is of no effect if it is unreasonable. The court will not modify it and then enforce it, except so far as the defendant may consent thereto.<sup>1</sup> In Ohio, Michigan, Nebraska and Kentucky such stipulations are held to be against public policy and therefore void.<sup>2</sup> The same rule is held in the federal circuit court of Arkansas.<sup>3</sup> Where an attorney fee of ten per cent. was stipulated to be paid as liquidated damages, in addition to the principal and interest in case of collection "by suit at law or otherwise," it was held that the stipulation did not affect the liability of an indorser; the measure of damages as to him, as has been before stated, is the amount paid by the indorsee and interest.<sup>4</sup> Nor will the insertion of such or a similar stipulation make the note uncertain and thereby prevent it from being treated as commercial paper. Such additional sum being payable only after default, it adds nothing to the note while it is in circulation as such before maturity; it only attaches after dishonor and in some states does not affect its negotiability.<sup>5</sup> In others such a provision renders the note non-negotiable.<sup>6</sup> It has been treated in Kentucky as a penalty, and although recoverable under appropriate pleading when judgment went by de-

*America v. Ellis*, 2 id. 44 (holding accommodation indorsers liable for the stipulated fee).

<sup>1</sup> *Kimball v. Moir*, 15 Ore. 427.

<sup>2</sup> *Dow v. Updike*, 11 Neb. 95; *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 id. 417; *Bullock v. Taylor*, 39 Mich. 137; *Myer v. Hart*, 40 id. 517; *Wright v. Traver*, 73 id. 493; *Witherspoon v. Musselman*, 14 Bush, 214.

<sup>3</sup> *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662.

<sup>4</sup> *Short v. Coffeen*, 76 Ill. 245.

<sup>5</sup> *Gaar v. Louisville Banking Co.*, 11 Bush, 180; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; *Schlesinger v. Arline*, 31 Fed. Rep. 684 (a fixed per cent. as fees); *Howenstein v. Barnes*, 5 Dill. 482; *Adams v. Addington*, 16 Fed. Rep. 89 (fixed per cent.); *Heard v. Dubuque Co. Bank*, 8 Neb. 10; *Trader v. Chidester*,

41 Ark. 242 (stipulated fee); *Roberts v. Snow*, 27 Neb. 425; *Hamilton Gin & Mill Co. v. Sinkers*, 74 Texas, 51.

<sup>6</sup> *Altman v. Rittershofer*, 68 Mich. 287 (stipulation to pay "attorneys' fees"); *Altman v. Fowler*, 70 id. 57; *Garretson v. Purdy*, 3 Dak. 178 (reasonable attorney's fee); *Jones v. Ratz*, 27 Minn. 240; *Hardin v. Olson*, 14 Fed. Rep. 705; *Chase v. Whitmore*, 68 Cal. 545; *First Nat. Bank v. Bynum*, 84 N. C. 24 (*semble*); *First Nat. Bank v. Jacobs*, 73 Mo. 35, and other cases in that state there cited; *Adams v. Seaman*, 82 Cal. 636; *Woods v. North*, 84 Pa. St. 407; *First Nat. Bank v. Larsen*, 60 Wis. 206 (in the two last cases the per cent. to be recovered as a fee was fixed); *Maryland Fertilizing & Manuf. Co. v. New-*

fault, yet if resisted by invoking the equitable jurisdiction of the court, relief might be had against it;<sup>1</sup> but later such stipulations in that state have been held to be against public policy and void.<sup>2</sup> Separate suits may be brought at the same time by an indorsee against the maker and indorsers, and recoveries had against each. And in that case, payment of the debt in one case, with the costs of the same, will not discharge the other judgments; but the costs of each action must be also paid.<sup>3</sup> An indorser who has been compelled to pay a bill or note by suit against him cannot recover such costs of prior parties.<sup>4</sup> But an accommodation party, who has been compelled by suit to pay, may doubtless recover the costs, as well as the face of the paper, from the party whose legal duty it was to provide for and pay it.<sup>5</sup> After the dishonor of a bill by the acceptor's non-payment the holder cannot charge the drawer or indorser commissions and expenses paid an agent for subsequently collecting a part of it from the acceptor.<sup>6</sup>

§ 565. **Value of notes and bills.** Notes against solvent parties, or those able and willing to pay them at maturity, possess value, which approximates to the sum they call for, according to the credit and responsibility of the parties liable on them. In Kentucky, Tennessee and some other states, a class of contracts has existed in the form of notes payable in cash-notes of third persons, generally designated as cash-notes

<sup>1</sup> Gaar v. Louisville Banking Co., 11 Bush, 180; Thomassen v. Townsend, 10 id. 114.

<sup>2</sup> Witherspoon v. Musselman, 14 Bush, 214.

<sup>3</sup> In Wattles v. Laird, 9 Johns. 326, it appears that separate suits had been brought by the indorsee of a promissory note against the indorser and maker. In the suit against the former, A. became special bail. The plaintiff recovered judgment in both actions. Afterwards a *fi. fa.* issued against the maker, and was returned satisfied. A *ca. sa.* was issued against the indorser, and after return of the execution in the other action was returned *non est.* In an action of debt on the recognizance of bail, his

bail pleaded payment and set-off of the amount paid by the maker as money paid to his use. It was held that the recognizance being forfeited, the matters pleaded by the defendant could not be set up in bar of the suit on the recognizance, in which a judgment must be given for the penalty; but the defendant might show the payment by the maker in mitigation so that the damages should be assessed for costs only of the suit against the principals.

<sup>4</sup> Dawson v. Morgan, 9 B. & C. 618; Simpson v. Griffin, 9 Johns. 131; Roach v. Thompson, 4 C. & P. 194; Steele v. Sawyer, 2 McCord, 459.

<sup>5</sup> 1 Parsons on N. & B. 662.

<sup>6</sup> Bangor Bank v. Hook, 5 Me. 174.

of good, solvent men — indicating that such notes were in circulation, in some sort a substitute for money as a medium of exchange. Contracts so payable have generally been construed as promises to pay the amount specified in notes of the description mentioned at par value. And for failure to make such payment, the measure of damages recoverable in legal currency is the actual value of the cash-notes when they should have been paid over;<sup>1</sup> not the rate at which shavers purchase them nor their par value. The expense of collecting is to be considered; and the difference made in every-day transactions between them and money in the sale of property is the true criterion of value.<sup>2</sup> The courts said such commodities as individual promissory notes have no fixed value ascribed to them by law. Money, alone, being the legal standard of values, that alone is, in judgment of law, necessarily equivalent [189] to its actual denominations.<sup>3</sup> In the absence of any other proof, the jury may infer from the terms *good notes then due* that they were to be equal to money, and their verdict

<sup>1</sup> Gholson v. Brown, 4 Yerg. 496; Murray v. McMackin, id. 41; Ward v. Latimer, 12 Tex. 438.

<sup>2</sup> Williams v. Brasfield, 9 Yerg. 270; Younger v. Givens, 6 Dana, 1.

<sup>3</sup> Id. In Murray v. Pate, 6 Dana, 335, upon a verbal agreement for the sale of land by Pate to Tunstall, at the price of \$500, the latter placed in the hands of Murray, the defendant, a single bank note for \$500, upon a southern bank, to be delivered to the plaintiff upon his making a deed for the land, provided another person designated should say that the plaintiff's title was good; the person so designated having pronounced the title good, a deed was executed by the plaintiff, and tendered, but refused by both the purchaser and the defendant. Tunstall told the defendant not to pay the money to the plaintiff. The defendant delivered up the money on the purchaser's order and indemnity. The action was for money had and received, and the

trial court instructed the jury "that if the \$500 was received in bank paper, but was considered as money, and received as money, and had been used by Murray, then he is liable in this action for it as money." The court of appeals, by Judge Marshall, said: "To the instruction given there are several objections. First. There is no evidence conducing to prove that the bank note was received as so much money; or that it was used, in any proper sense of that term, by Murray himself; and he being a mere depository, or stakeholder, of the specific article, could not be liable for more than its value, for failing to deliver it to the person for whose use he held it. Second. The note not having been received *expressly* as money by Murray, nor expressly agreed to be so received by Pate, neither its nominal amount nor its value could have been recoverable in this action for money had and received." 1 Chitty, Pl. 385.

so found will stand; for the court cannot judicially know that the assessed value was too high.<sup>1</sup> And a promise to pay a given amount in the note or other pecuniary obligation of the promisor is valued at the sum which would be payable by such note or obligation.<sup>2</sup>

A party having as agent, pledgee, borrower, or otherwise, the possession of a note or bill belonging to another, and bound to diligence in collecting it, or to take the proper steps to charge indorsers or other secondary parties, and who is guilty of negligence in the performance of that duty by which the paper becomes worthless, is *prima facie* liable for its amount. His liability is to compensate the actual loss; and it devolves on him to show, if he can, that the paper would be, with the diligence he was bound to exercise, worth less than its face.<sup>3</sup> Thus, if A. loan the note of a third person to B., the latter must use due diligence to recover the amount due upon it; and if the debt be lost by the insolvency of the maker and by B.'s want of diligence, he must pay the amount of the note to A.<sup>4</sup> And the same rule applies in assessing damages for the wrongful conversion of a note; that is [190] to say, the face of the note is *prima facie* recoverable; but the defendant may show that it was worth less.<sup>5</sup>

It devolves on the plaintiff suing for want of diligence to show that the primary party is insolvent; or, in other words, that by the negligence of the defendant the paper is of no value.<sup>6</sup> A recovery may be had for the full amount of the paper if a pledgee converts it to his own use, unless he shows

<sup>1</sup> Sirlott v. Tandy, 3 Dana, 142.

<sup>2</sup> In *Memphis, etc. R. Co. v. Walker*, 2 Head, 467, a set-off was offered of the following obligation: "Six months from date, or sooner if practicable, the M. & L. R. R. Co. promise to pay to the order of H. & A. \$5,000 in the bonds of said company, *at par*; of equal character with any bonds issued by said company; to bear interest, etc., in part payment of the award made," etc. It was held that on default in paying the obligation the measure of damages was the nominal value, \$5,000, not the

value at which the bonds might be rated in the market. So a general deposit of bills of the bank receiving them must be repaid at the nominal amount, although current at half their amount at the time of the deposit. *Bank of Kentucky v. Wister*, 2 Pet. 318.

<sup>3</sup> *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485; *Downer v. Madison Co. Bank*, 6 Hill, 648.

<sup>4</sup> *Higbee v. Hopkins*, 1 Wash. C. C. 230.

<sup>5</sup> *McPeters v. Phillips*, 46 Ala. 496.

<sup>6</sup> *Hough v. Hunt*, 1 Ohio, 504.



that the promisor is unable to pay it.<sup>1</sup> The same rule of damages applies in favor of a purchaser to whom the defendant has fraudulently sold a note which had been paid. The measure of damages is *prima facie* its amount. The ability of the maker to pay will be presumed until the contrary is shown.<sup>2</sup> But the damages for breach of an agreement to return to the maker a paid or released note, already past due, cannot be its full amount, unless it be shown that in consequence of the breach the plaintiff has been, by force of the *prima facie* import of the paper and its apparent negotiability, compelled to pay it to some subsequent holder in spite of a diligent endeavor to prove the facts which, if proved, would constitute a complete defense.<sup>3</sup>

<sup>1</sup> Thomas v. Waterman, 7 Met. 227;      <sup>3</sup> Barmon v. Lithauer, 4 Keyes, Latham v. Brown, 16 Iowa, 118.      317.

<sup>2</sup> Neff v. Clute, 12 Barb. 466.

## CHAPTER XIII.

## VENDOR AND PURCHASER.

## § 566. Damages for breach of contracts for sale of realty.

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## § 566. Damages for breach of contracts for sale of realty.

[191] Under this general head it will be convenient and appropriate to present consecutively the law of damages appli-

cable to contracts of sale and purchase of both realty and personalty, as well as the obligations for assuring quality, quantity and title. Those which relate to lands require separate treatment, and will be first considered; then those which relate to things of a personal nature.

The sense and aim of the law in respect to contracts generally are well expressed by Hosmer, C. J., in a Connecticut case: "The rule of damages on the breach of an express contract has long been established; and whether it relate to real or personal estate, it must necessarily be the same. Whenever a person for a legal consideration agrees to do a certain act, and, in the event of his not doing it, the damages are not stipulated by the parties, the law, on the ground of reason and natural justice, implies that the person in default shall pay the damages accruing from the non-performance. The object of the parties ought to be attained as nearly as possible; and that is, that the specific act agreed to be done should be performed. If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing which he contracted to do, and such value to be estimated at the time when the act in question should have been executed."<sup>1</sup> These principles, for the most part, apply to contracts relating to real estate. But an exceptional rule of damages to some extent has been applied, by which, instead of allowing the purchaser, as the injured party, damages equal to the benefit he would derive from performance, the amount allowed him has been fixed on the standard of rescission. This rule does not gainsay the principle of compensation, but is based on considerations of policy; and in this country is treated as an exception.

### SECTION 1.

#### VENDOR AGAINST PURCHASER.

#### § 567. Seller entitled to purchase price and interest.

The utmost pecuniary redress which a vendor may claim [192] against a vendee in respect of a contract of purchase is the agreed price, and interest upon it from the time it became due. Collection thereof accomplishes specific performance.

<sup>1</sup> Wells v. Abernethy, 5 Conn. 222.



Where the promises to convey and to pay are to be performed simultaneously, and are, therefore, mutually dependent, a court of equity will not decree performance against the vendee by requiring him to pay, except upon the terms of the vendor doing equity on his part by making effectual conveyance of the title according to the contract.<sup>1</sup>

§ 568. **The legal remedy.** The theory of the legal remedy on the contract is not that of specific performance; but the recovery of damages commensurate with the injury resulting from non-performance. There are a few cases in England and this country in which, on the mere tender of a conveyance not accepted, recovery at law has been permitted or countenanced of the entire purchase-money.<sup>2</sup>

<sup>1</sup> *Gaines v. Bryant*, 4 Dana, 395.

<sup>2</sup> *Hawkins v. Kemp*, 3 East, 410. There is an implication in favor of such recovery in *Goodisson v. Nunn*, 4 T. R. 761. In *Glazebrook v. Woodrow*, 8 id. 366, it was decided that no action for the purchase-money could be brought by the vendor without averring that he had conveyed or *tendered a conveyance*. *Alna v. Plummer*, 4 Me. 258; *Garrard v. Dollar*, 4 Jones' L. 175; *Sanborn v. Chamberlin*, 101 Mass. 409; *Worthy v. Jones*, 11 Gray, 168; *Franchot v. Leach*, 5 Cow. 506; *Tripp v. Bishop*, 56 Pa. St. 424. See *Hansbrough v. Peck*, 5 Wall. 497.

In *Richards v. Edick*, 17 Barb. 260, Gridley, J., expressed disapproval of this rule, but, regarding it as settled in New York, allowed recovery accordingly. He says: "It is insisted by counsel for the defendant that the measure of damages assumed in the first count, viz., the purchase price of the land, is not the true one. He argues that the title to the land does not pass by the tender of a deed to the defendant, and the plaintiff's continued readiness to deliver it, and that the true measure of damages is the excess of the contract price over the actual value of

the land; and that inasmuch as there is no averment of such excess of the purchase price and no other damage claimed, the \$100 which the plaintiff admits to have been paid more than balances the nominal damages arising on a breach of the contract by the defendant. The counsel is certainly sustained in his position as to the true measure of damages by the decision of the court in *Laird v. Pim*, 7 M. & W. 474. It also seems to me, that were it a new question in this state, there would be reason for adopting the principle which is now held to be law in the English courts. Because what is sought to be recovered is damages for the violation of the defendant's contract, by which the plaintiff has suffered loss. But in the case of an agreement for land the title does not pass by tender of the deed; nor does it pass by operation of law on the recovery of a judgment for the purchase price, as is sometimes true of personal property. It is a case, therefore, where the plaintiff holds the title to the land, and recovers its full value expressed in the contract; and after judgment, when the defendant seeks to obtain the land, a court of law is

§ 569. **Measure of damages.** In a contract provid- [193]  
ing for concurrent execution by the parties, it and its consid-  
eration are mutually executory, and neither party is bound  
absolutely to fulfill without performance on the other side;  
and each, on general principles, has the legal right to violate  
his contract on the usual terms of compensating the other for  
the damages which the law allows, and subject to the juris-  
diction of equity to decree specific performance.<sup>1</sup> If either  
can obtain, in a court of law, a judgment which enforces lit-  
eral performance by the other on a mere proffer of the act  
which is the consideration, he obtains for himself specific per-  
formance without subjecting himself to a jurisdiction which  
courts of equity exercise in such cases to render the relief  
reciprocally just and equal. A judgment for the purchase-  
money on a mere tender of a conveyance, in a legal [194]  
sense, is founded on the erroneous assumption that the tender  
of a deed is equivalent to a transfer of the property, and that  
the purchaser from the time it is made owes the agreed price.  
Such tender does not pass the title, though followed by re-  
covery and collection of the stipulated consideration; and  
hence, the vendor would have both the purchase-money and  
the legal seizin of the land sold. If he has not received a  
deed, taken or surrendered the possession, he should not be  
subjected to the payment of the purchase price.<sup>2</sup> In an Eng-  
lish case<sup>3</sup> the court say the plaintiff cannot have the land and  
the value too. A tender of performance will perfect a right  
of action; but it is not equivalent to performance for the re-  
covery of damages.<sup>4</sup> In some cases the courts have permitted

without the power of affording him any relief. . . . The English rule would therefore seem to be more in accordance with general principles, and more in analogy to the action for not accepting personal property, as wheat, or other commodity, which the defendant has purchased and contracted to receive and pay for. There is no necessity for the exercise of this jurisdiction, for the court of chancery is competent to order a specific performance of the agreement, and, at the same time, to

see that a valid deed conveying the title is delivered on the payment of the contract price." See *Bement v. Smith*, 15 Wend. 493; *Shannon v. Comstock*, 21 id. 457.

<sup>1</sup> *Clark v. Marsiglia*, 1 Denio, 317.

<sup>2</sup> *Scudder v. Waddingham*, 7 Mo. App. 26.

<sup>3</sup> *Laird v. Pim*, 7 M. & W. 474.

<sup>4</sup> *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 376; *Wilson v. Martin*, 1 Denio, 602; *Spencer v. Halstead*, id. 606; *Shannon v. Comstock*, 21 Wend. 457; *Hecksher*

the whole purchase-money to be recovered where the deed, after tender, has been recorded<sup>1</sup> or has been brought into court to be delivered to the defendant. In a case in Maine<sup>2</sup> the defendant gave his bond in a penalty of \$15,000, conditioned to pay for land according to the recited terms, which were one-third part of the purchase-money for one thousand two hundred and eighty acres at \$6 per acre in thirty days, and two notes payable in one and two years, with good security, for the other two-thirds, the obligee being ready and willing to make the conveyance. An action of debt was brought on the bond without being preceded by even the tender of a deed. Emery, J., said: "This contract decidedly throws on the defendant the obligation of *first tendering the money* and the two notes with good security; for without this he could not expect to find the plaintiff ready and willing to make the [195] deed of conveyance free from all incumbrances. But this does not impose on the defendant the duty of parting with his money without receiving the deed of conveyance, provided he takes the precaution of demanding it, and the jury ought not to have withdrawn from them the question whether the plaintiff was on his part ready to perform. . . . When a contract is made to sell and convey on one side, and on the other to purchase and pay for land, on a breach of the agreement each party has an election to seek for damages in a suit at law, or proceed in equity for a specific performance. It is rather unusual for the same party to pursue both remedies. If the seller commence his suit at law, it is supposed that he is contented to keep the property, and pocket the damages which a jury may give him in satisfaction for the injury. Should he wish to get rid of the land, he will proceed in equity to compel specific performance, and in that case nothing would be recovered but the money and interest which were to be given. . . . The appeal to the jury in this case is to be

v. McCrea, 24 id. 304; Boardman v. Dana, 473; Davis v. Ayres, 9 Ala. Keeler, 21 Vt. 77; Clark v. Mayor, 4 292; Rankin v. Darnell, 11 B. Mon. N. Y. 338; Derby v. Johnson, 21 Vt. 30.  
 17; Philadelphia R. Co. v. Howard, <sup>1</sup> Sanborn v. Chamberlin, 101 Mass. 13 How. (U. S.) 307; Pitkin v. Frink, 409.  
 8 Met. 12; Donaldson v. Fuller, 3 S. <sup>2</sup> Robinson v. Heard, 15 Me. 296.  
 & R. 505; Jewell v. Blandford, 7

relieved from the penalty of \$15,000. If that sum had truly and intentionally been adopted and described in the contract as liquidated damages, and not as a penalty on failure of performance, it may be doubted whether a court or a jury could rightfully have changed it. And had the deed been tendered in season and brought into court by the plaintiff and filed to be delivered to the defendant, perhaps the rule of damages prescribed by the judge (the purchase-money) would be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land. And the argument, then, that because he holds the land he ought not to recover the price stipulated to be paid by the defendant in money, ought not to avail, as it would tend to encourage people to break their contracts, in the hope of escaping with trifling damages, by casting the commodity back upon the seller's hands. But under these exceptions no tender of the deed appears to have been made, nor does it appear to have been brought into court. Under such circumstances, to give the plaintiff a perfect indemnity, the rule, the court understands, to be the difference between the sum which the defendant agreed to give for the land and the sum for which the plaintiff could have sold it on the day when [196] the contract should have been performed. Had the plaintiff put it up and sold it at auction on that or the next day after the refusal to take upon fair notice, and obtained a sum of money for it, it would be the duty of the defendant to make up the deficiency, and those two sums would have been the same as the plaintiff would have received if the defendant had performed. If the plaintiff has not done that, nor offered the title to the defendant, then he elects to keep the land at what price it might have sold for at that time."

§ 570. **Same subject.** It is evident, however, that these are irregular expedients to give the judgment at law the effect of specific performance. The importance given to the deposit of a deed in court implies that the sum recovered is not adjudged as damages for failure to perform the contract; but a decree is made for the specific moneys agreed to be paid, and decreed in view of such deposit, by which the plaintiff ostensibly keeps good a tender of equitable terms not expressly required or defined by the court. The measure of damages



which is more in accord with legal principles and analogies is that laid down in the English case which has been referred to;<sup>1</sup> and which has been followed in several late decisions in this country — the difference between the price fixed in the contract and the real value at the time the contract was to be executed. In a Massachusetts case<sup>2</sup> the court, alluding to the argument for the rule that the purchase-money should be the measure of damages, said: "We apprehend that that rule of damages, however applicable it may be to cases of contracts for the sale of personal property, where, by force and effect of mere delivery, or by judgment at law for the value of an article, the property may become vested in the party paying damages therefor, does not apply to real estate, which can only be transferred by deed. In actions against a vendee, on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agrees to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference be- [197] tween the price fixed in the contract and the salable value of the land at the time the contract was to be executed." Finding some diversity of opinion on the subject, and even some Massachusetts cases not in accord with that rule, the conclusion was reached that "upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land and the salable value of the land at the time the contract was broken."<sup>3</sup>

In Pennsylvania the purchase-money may be and is habitually recovered or its payment enforced at law. There being no court of chancery in that state, specific performance, in

<sup>1</sup> *Laird v. Pim*, 7 M. & W. 474.

<sup>2</sup> *Old Colony R. Co. v. Evans*, 6 Gray, 25.

<sup>3</sup> *Griswold v. Sabin*, 51 N. H. 167; *Porter v. Travis*, 40 Ind. 556; *Lewis v. Lee*, 15 id. 499; *Wilson v. Holden*, 16 Abb. 133; *Marcus v. Smith*, 17 Up.

Can. C. P. 416; *Adams v. McMillan*,

7 Port. 73. See *Dayton, etc. T. Co. v. Coy*, 13 Ohio St. 84; *In re Charles*

*Lafitte & Co.*, 23 W. R. 379; *Miller v. Collyer*, 36 Barb. 250; *Gray v. Case*, 51 Mo. 463; also *Webster v. Hoban*, 7 Cranch, 399.

name, is worked out in various legal actions. It may be done in covenant, debt, *assumpsit* or ejectment.<sup>1</sup> When the purchase-money is so recovered by the vendor it is permitted as specific performance. That relief is so commonly granted at law that it is held under the act of 1836, giving jurisdiction in equity for specific relief where damages recoverable at law would be an inadequate remedy, that a suit for specific performance at the instance of a vendor cannot be maintained where he asks merely for the recovery of purchase-money.<sup>2</sup> The cases are numerous in that state; they illustrate the flexible character of the practice at law, and the facility with which legal actions are used to afford equitable redress. The legal rule of damages there, based on the vendor's repudiation of the contract, if it cannot be specifically enforced, is the difference between the contract price and the real value at the time of the breach.<sup>3</sup>

Where the purchase-money is recoverable at law, it [198] must of course be declared for, and its recovery is an enforcement of the contract.<sup>4</sup> Such a recovery in effect compels the vendee to take the property by obliging him to pay for it.<sup>5</sup> But it is only in clear cases, where the vendor is ready and willing to perform and has offered to do so, that such a recovery can be had. If he is in default in point of time, or has not title, or his title is not good, he cannot recover.<sup>6</sup> There can be only technical objections to such recovery at law. The practical result is the same whether the contract is enforced in one court or another. So long as the right of property in the thing agreed to be sold has not passed to the purchaser the vendor is entitled, in case of the non-completion of the contract, to resell it; and if the resale has taken place within

<sup>1</sup> Pennock v. Freeman, 1 Watts, 401; Stokely v. Trout, 3 id. 163; Dixon v. Oliver, 5 id. 509; Findlay v. Keim, 62 Pa. St. 112.

<sup>2</sup> Kauffman's Appeal, 55 Pa. St. 383.

<sup>3</sup> Meason v. Kaine, 67 Pa. St. 126; Huber v. Burke, 11 S. & R. 238; Bowser v. Cessna, 62 Pa. St. 148; Ellet v. Paxson, 2 W. & S. 418. See Hutton v. Williams, 35 Ala. 503; Kelly v. Cunningham, 36 id. 78.

<sup>4</sup> Porter v. Travis, 40 Ind. 556; Bowser v. Cessna, 62 Pa. St. 148.

<sup>5</sup> Id.

<sup>6</sup> Felter v. Weybright, 8 Ohio, 168;

Kauffman's Appeal, 55 Pa. St. 383;

Meason v. Kaine, 67 id. 126; Negley v. Lindsay, id. 217; Huber v. Burke, 11 S. & R. 238; Smith v. McClosky, 45 Barb. 610; Walker v. France, 112 Pa. St. 203.

a reasonable period after the breach, the difference between the price realized thereon and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover, in addition to the costs, charges and expenses of the resale.<sup>1</sup> What is a reasonable time in which to make a resale is a question of fact. The lapse of such a period as would give opportunity for fluctuations in the market, in the usual order of things, or of such as would authorize the inference that the vendor had elected not to adopt this means of fixing the measure of the vendee's liability, would be unreasonable.<sup>2</sup> The sale is in some sense a sale of the defendant's property to pay his debt, and he is entitled to notice of it.<sup>3</sup> The vendee's liability will not be affected by the resale if it was made under terms more onerous than those of the original sale. This rule applies though the conditions of the second sale were prescribed by a court.<sup>4</sup> In order that a vendee may be made liable for the difference be-

<sup>1</sup>Kempner v. Heidenheimer, 65 Texas, 587; McBrayer v. Cohen, 18 S. W. Rep. 123 (Ky.); Bowser v. Cessna, 62 Pa. St. 148; Webster v. Hoban, 7 Cranch, 399.

In the last case, upon a sale of land at auction, the terms were that the purchaser should within thirty days give his notes, with two good indorsers, and, if he should fail to comply within thirty days, then the lands were to be resold on account of the first purchaser. Held, that the vendor could not maintain an action against the vendee for a breach of the contract until such resale should take place, and have ascertained the deficit, although the vendee should instruct an attorney to draw a deed and insert his name as purchaser. Livingston, J.: "It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have been sold for less, and

then, by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be if this action proceeds, to have damages assessed against him by some uncertain and arbitrary or unsatisfactory rule which might be adopted by a jury. Of these advantages, which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him."

The damages for the breach of a contract for the right to purchase public land are measured by the difference between the stipulated price and the salable value of the right. The vendor must resell his right or show its market value as a basis for recovery. Telfener v. Russ, 145 U. S. 522.

<sup>2</sup>Kempner v. Heidenheimer, 65 Texas, 587.

<sup>3</sup>Id.; Bowser v. Cessna, 62 Pa. St. 148.

<sup>4</sup>Weast v. Derrick, 100 Pa. St. 509; Banes v. Gordon, 9 id. 426.

tween the price he agreed to pay and that realized on a resale his agreement to purchase must have been made on that condition,<sup>1</sup> unless the purchase was made at an official sale.<sup>2</sup> In Rhode Island an administrator's sale is not an official sale so as to subject the purchaser thereat to this measure of liability.<sup>3</sup> In Kentucky one who purchases land at a public auction and repudiates his contract is liable for the difference between his bid and the price realized at a subsequent resale made in the same way, and the costs of such resale. The court do not make the distinction that the original purchase must be made subject to the risk of a resale, nor that either sale must be official.<sup>4</sup>

If the vendor does not resell the estate or, in case of sale, does not sell it conformably to the rules stated, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property,<sup>5</sup> together with his costs, charges and expenses. Amongst these [199] costs and charges may be included the expense of making out the title; for although that is, by custom and usage, defrayed by the vendor, yet it is done upon the understanding that the contract will be duly fulfilled by the purchaser.<sup>6</sup> If the conditions of sale provide for the payment of a deposit by the purchaser, and for its forfeiture in case of his failure to comply with the conditions, the deposit must, nevertheless, be brought into account by the vendor if he seeks to recover the deficiency on a resale of the property.<sup>7</sup>

A grantee who accepts a deed in pursuance of an oral contract for the purchase of land and refuses to execute the note and mortgage which he agreed to give for the deferred payments is liable for the consideration agreed upon and interest thereon; the whole amount may be recovered if it was due before the trial.<sup>8</sup> And for the sum expended in purchasing an

<sup>1</sup> McGuinness v. Whalen, 16 R. I. 558; Adams v. McMillan, 7 Port. 73; Robinson v. Garth, 6 Ala. 204.

<sup>2</sup> Lamkin v. Crawford, 8 Ala. 153; Hutton v. Williams, 35 id. 503.

<sup>3</sup> McGuinness v. Whalen, 16 R. I. 558.

<sup>4</sup> McBrayer v. Cohen, 18 S. W. Rep. 123.

<sup>5</sup> Wasson v. Palmer, 17 Neb. 330; Kempner v. Heidenheimer, 65 Texas, 587.

<sup>6</sup> 1 Addison on Cont., § 528.

<sup>7</sup> Okenden v. Henly, El. Bl. & El.

485.

<sup>8</sup> Niland v. Murphy, 73 Wis. 326.



unmatured mortgage upon the premises,<sup>1</sup> and the difference between the value of the land and the agreed price for it, and such other loss sustained by the vendor as could have been reasonably anticipated.<sup>2</sup> It is said in a recent case that it may not be easy to determine what damages can be recovered on a contract to purchase real estate when it has been terminated by a forfeiture. It is certain, however, that the purchaser is not liable for the amount paid by the vendor to his own agent for negotiating the sale; and if the vendor can sell the property so as to entirely recoup the loss, the damage would not be substantial. But the loss, whatever it is, if not confined to rent, must depend upon what the defendant should have paid.<sup>3</sup>

§ 571. **Where notes are given for the price.** Where, however, promissory notes are made for the purchase-money, the rule applicable where the contract is disaffirmed can have no application. It would be no defense to an action on a promissory note that its consideration was an agreement to convey lands; that the consideration had failed wholly or in part because, though the vendor had tendered the deed, the maker of the note had refused it and declined to consummate the [200] purchase.<sup>4</sup> Giving notes for the purchase-money so far

<sup>1</sup> Kelley v. West, 36 Minn. 520.

<sup>2</sup> Hurd v. Dunsmore, 63 N. H. 171.

<sup>3</sup> Hubbard v. Epworth, 69 Mich. 92.

<sup>4</sup> In *White v. Beard*, 5 Port. (Ala.) 94, A. sold lands by parol agreement and put his vendee in possession. After the vendor's death the vendee executed his note to the vendor's administrator, and took his bond for conveyance on payment of the purchase-money. It was held that the administrator could recover, and the defense of a failure of consideration could not be made, though he was not able to convey the land. As the intestate made the verbal sale and put the purchaser in possession, the contract was partly performed, so as to be capable of specific execution in equity, and, as the intestate had thus manifested an intention to convert

the land into money, it belonged to the administrator, and the right of the heirs was subject to their disposition. *Lynch v. Baxter*, 4 Tex. 431; *Carter v. Carter*, 1 Bailey, 217; *Patton v. England*, 15 Ala. 69.

In *Lewis v. McMillen*, 41 Barb. 420, an action was brought on a note given for \$1,000 by McMillen as principal and two others as sureties. These are the facts: On the 21st of April, 1857, the plaintiff entered into a contract with McMillen to sell him a farm of about ninety-six acres at \$34.50 per acre. McMillen agreed to pay \$300 May 15, 1857, \$200 on the 1st of November, 1857, and \$1,000 May 1, 1858, upon which payment and his giving a bond and mortgage for the residue of the purchase-money the plaintiffs were to convey in fee by a

executes the contract to buy that the seller may sue on them without alleging the sale, and recover, unless the maker [201] is able to show some defect of consideration by the fault of

good and sufficient deed. The payment of the money was declared by the contract to be a condition precedent to the execution of a deed. The note in question was given at the execution of the contract for the \$1,000 instalment. The defendant offered to prove, and the rejection of the evidence was the question to be decided, on motion for a new trial, among other things, that the defendant paid the \$300 and the \$200, and tendered amount of the note and interest when due and demanded conveyance, but the plaintiff not having title except to four-fifths could not, and refused to, convey; that the defendant required a rescission of the contract and repayment of what had been paid and offered to relinquish possession, but the plaintiff refused to accede to the offer. Johnson, J., delivered the opinion and said: "This action is not upon the contract, nor between the parties to it. The action is upon a separate and independent promise by the purchaser and other parties to pay the plaintiffs the sum specified at a particular day. The consideration of this promise, it is true, is the agreement of the plaintiffs with McMillen. But before the defendants can defeat the action *entirely* they must show either fraud in the transaction in which the note has its inception, or an entire want or failure of consideration. A partial want or failure of consideration cannot be alleged in bar; and no fraud is shown. It is quite manifest that here is not an *entire* failure of consideration. The plaintiffs have not refused to convey the entire premises, and they insist upon their right to the whole, and this right to

the largest portion by far is conceded. But even if the plaintiffs had refused to convey, the contract being still executory on their part, the cases are abundant to show that such refusal is no bar to an action upon a separate note given to secure one or more of the payments. The party must pay the note and take his remedy upon the contract to recover damages for the breach. In such case the payment of the note and the conveyance are not concurrent but independent acts. The note is in the nature of a condition precedent, and must be paid. This was expressly ruled in *Spiller v. Westlake*, 2 B. & Ad. 155; 22 Eng. C. L. 49. Lord Tenterden, C. J., said: 'I can see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events.' Parke, J., was inclined to the opinion that the defense might have been maintainable if the circumstances had been such that had the defendant paid the money he would have been entitled to recover it back in an action brought by him, which he held could not be done so long as the contract remained open. Here the contract still remains open, neither party having rescinded or attempted to rescind. To the same effect are *Freligh v. Platt*, 5 Cow. 494; *Moggridge v. Jones*, 14 East, 486; S. C., 3 Camp. 38, and *Chapman v. Eddy*, 13 Vt. 205; 1 Pars. on Bills, 203, note z . . .

"The contract being, as we have seen, still open and unrescinded, and the defendant, McMillen, being in

the vendor. The contract to convey, and the notes for the consideration, though separate instruments, are to be construed [202] together, and are parts of one contract;<sup>1</sup> and if they provide for payment on one side and conveyance on the other,

the full enjoyment of the benefit of the consideration of the note, is in no situation to resist payment. Parsons, in his book on Bills and Notes, at page 203, notices a distinction between the failure of the consideration of the note and the failure of a benefit resulting from it. As, where one party promises another to do a certain thing, and the other gives his note to the promisor in consideration of such promise, the latter cannot defend against the note on the ground of a failure of the consideration so long as he retains the promise made to him, or if it be of such a nature that the other party is permanently held upon it. Before he can defeat the note he must cancel the promise. And in *Wright v. Delafield*, 23 Barb. 498, it was held that a purchaser of land could not keep the land and refuse to pay for it, whether the title was good or bad. That if it was bad he must elect to take it as it was, or as the vendor could make it, and pay for it, or else give it up. And that as the purchaser did not elect to give up the land, he must pay for it according to his agreement. This is only stating, in another form, a very familiar and elementary rule of law, that where one obtains a right to the possession of land, and to the use and profits thereof by virtue of an agreement, he cannot, while thus holding the land, dispute the title of him from whom he obtained it, and refuse to perform his agreement under which he entered and continued to hold. Before he can do this he must surrender the possession and place the party *in statu quo*. In other

words, he must rescind *in toto* by restoring what he received. The action here is upon a separate promise, executed in part by persons who are not parties to the contract, and which contract is still open, neither party having put an end to it on account of the default of the other, but each retaining everything acquired under it. How can the court say that the plaintiffs shall not have the benefit of the contract on their side, to recover according to its terms the value of the property which the defendant McMillen obtained from them by means of it, and which he still keeps and enjoys, and holds from them only. It was in consideration of his promise that he obtained possession of these premises, and has so long enjoyed their use, and so long as he elects to keep the consideration and the benefits resulting from it the law must hold him to his promise, and allow the other party to enforce it. Before the court can have any right to absolve him from his promise, he must do works meet for such absolution, which he has not yet done. It would be monstrous injustice, as it seems to me, in the court to drive the plaintiffs to rescind the contract, and seek some other remedy outside of it, in order to wrest the property from the tenacious grasp of the purchaser." See *Hulshizer v. Lamoreux*, 58 Ill. 72.

<sup>1</sup> *Bailey v. Cromwell*, 4 Ill. 71; *Duncan v. Charles*, 5 id. 561; *Davis v. McVickers*, 11 id. 322; *Berryhill v. Byington*, 10 Iowa, 223; *School District v. Rogers*, 8 Iowa, 316.

to take place at the same time, they are concurrent acts, and in their nature reciprocally dependent in the matter of performance. The vendor is not obliged to convey unless the purchase-money is paid; nor can he be put in default, if he is able to fulfill, except by its payment or tender.<sup>1</sup> But if he is unable to make title, or on demand and offer of the purchase-money refuses to convey, that fact will entitle the purchaser to rescind; and it will avail to support an action on the contract to sell, or as a defense to the vendor's action, either on the contract of purchase or on notes given for the purchase-money.<sup>2</sup>

§ 572. **Seller must convey perfect title.** Unless the contract specifies some exception, or can be construed to intend the contrary,<sup>3</sup> it binds the vendor to convey a perfect, unincumbered title.<sup>4</sup> If the purchaser has been let into possession, he cannot rescind for the default of the vendor unless [203] he surrenders such possession;<sup>5</sup> but where the obligation is concurrent to convey a good title at the time of receiving payment, the purchaser is not precluded by his possession from setting up a defect of the vendor's title, or his refusal to

<sup>1</sup> Id.

<sup>2</sup> *Lewis v. McMillen*, 31 Barb. 395. But see *S. C.*, 41 Barb. 420; *Cooper v. Singleton*, 19 Tex. 260; *Baldrige v. Cook*, 27 id. 565; *Taylor v. Fulmore*, 1 Rich. 52; *Taylor v. Johnston*, 19 Tex. 351; *Lawrence v. Simonton*, 13 id. 220; *Clute v. Robison*, 2 Johns. 595; *Lewis v. Bibb*, 4 Port. 84; *Hunter v. Bradford*, 3 Fla. 269. Compare *Spiller v. Westlake*, 2 B. & Ad. 155; *Howard v. Witham*, 2 Me. 390.

<sup>3</sup> See *Corbitt v. Berryhill*, 29 Iowa, 157.

<sup>4</sup> *Cullum v. Branch Bank*, 4 Ala. 21; *Goddin v. Vaughn's Ex'r*, 14 Gratt. 102; *Souter v. Drake*, 5 B. & Ad. 992; *Doe v. Stanion*, 1 M. & W. 695; *Burwell v. Jackson*, 9 N. Y. 535; *Shreck v. Pierce*, 3 Iowa, 360; *Creigh v. Shatto*, 9 W. & S. 82; *In re Hunter*,

1 Edw. Ch. 1; *Hall v. Betty*, 4 M. & G. 410; *Purvis v. Rayer*, 9 Price, 488; *Beyer v. Marks*, 2 Sweeny, 715; *Pomeroy v. Drury*, 14 Barb. 418; *Hunter v. O'Neil*, 13 Ala. 37; *Greenwood v. Ligon*, 10 S. & M. 615; *Traver v. Halsted*, 23 Wend. 66; *Dwight v. Cutler*, 3 Mich. 566; *Andrews v. Word*, 17 B. Mon. 518; *Fleming v. Harrison*, 2 Bibb, 171; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 526; *Davis v. Dycus*, 7 Bush, 4; *Hatcher v. Andrews*, 5 id. 561; *Guynet v. Mantel*, 4 Duer, 94; *Grimes v. Ballard's Adm'r*, 8 B. Mon. 625; *Atkins v. Babrett*, 19 Barb. 639; *Witter v. Biscoe*, 13 Ark. 422.

<sup>5</sup> *Reed v. Davis*, 4 Ala. 83; *Jackson v. McGinnis*, 14 Pa. St. 331; *Gans v. Renshaw*, 2 id. 34. See *Giles v. Williams*, 3 Ala. 316.



convey, as a defense to an action on purchase-money notes, or a contract of purchase.<sup>1</sup>

§ 573. **Recoupment for defect of title.** Where the obligation to pay is precedent to that of the other party to convey, if the time fixed for conveyance has arrived, the inability of the vendor to make title is available as a defense to an action on notes for the purchase-money, on the principle of recoupment. If the defense goes to the whole purchase-money it may accomplish a nullification of the sale, and in the absence of any possession by the vendor, there is no obstacle to the defense generally at law.<sup>2</sup> But if the defendant has taken possession, and retains it at the time of the action, he affirms the contract, and can set up no counter-claim unless he has been damnified; though he may, of course, insist on a precedent condition, he cannot insist on a defect of the plaintiff's title unless he has been disturbed in his possession by it, or has extinguished it; nor any incumbrance, unless he has paid it;<sup>3</sup> in which case he can only recoup for the sum actually paid.<sup>4</sup>

<sup>1</sup> *Lewis v. White*, 16 Ohio St. 444; *v. Ellsworth*, 3 Conn. 483. See vol. *Lewis v. McMullen*, 31 Barb. 395; 1, § 183.

*Baldrige v. Cook*, 27 Tex. 565; *Davis v. McVicker*, 11 Ill. 327. But see *Lewis v. McMullen*, 41 Barb. 420.

In *McIndoe v. Morman*, 26 Wis. 588, a bond was given by the vendor for a deed, to be made at a specified time, provided the obligee should pay \$400 on or before that date. An action was brought by the vendor to foreclose the contract, the complaint containing the allegation that the plaintiff had tendered a deed. The answer set up, and on the trial it was proved, that the plaintiff's title was defective. It was held that the vendee, being in possession, could not resist the payment of purchase-money on that ground.

<sup>2</sup> *Fisher v. Salmon*, 1 Cal. 413; *Tillotson v. Grapes*, 4 N. H. 444; *Dickinson v. Hall*, 14 Pick. 217; *Trask v. Vinson*, 20 id. 110; *Moore v. Ellsworth*, 3 Conn. 483. See vol. 1, § 183.

<sup>3</sup> *Marsh v. Thompson*, 102 Ind. 272; *Small v. Reeves*, 14 id. 163; *Gaar v. Lockridge*, 9 id. 92; *Buell v. Tate*, 7 Blackf. 55; *Wiley v. Howard*, 15 Ind. 169; *Barber v. Kilbourn*, 16 Wis. 486; *Bordeaux v. Cave*, 1 Bailey, 250; *Carter v. Carter*, id. 217; *Stone v. Gover*, 1 Ala. 287; *Bates v. Terrell*, 7 id. 129; *Lamkin v. Reese*, id. 170; *Worthington v. McRoberts*, id. 814; *S. C.*, 9 Ala. 297; *Wilson v. Jordan*, 3 Stew. & P. 92; *Lee v. White*, 4 id. 178; *George v. Stockton*, 1 Ala. 136; *Christian v. Scott*, 1 Stew. 490; *Peden v. Moore*, 1 Stew. & P. 71; *Lynch v. Baxter*, 4 Tex. 431; *Wood v. Perry*, 1 Barb. 114; *Galloway v. Finley*, 12 Pet. 264; *Curran v. Rogers*, 35 Mich. 221. See *Tompkins v. Hyatt*, 28 N. Y. 347.

<sup>4</sup> *Kerley v. Richardson*, 17 Ga. 602; *Hull v. Harris*, 64 id. 309.

**§ 574. Purchaser cannot assail validity of contract. [204]**

While in possession under a parol contract of sale, the vendee cannot defend against notes for the purchase-money on the ground that the contract is void under the statute of frauds. The contract is not unlawful, and while he is in possession, and the vendor neither repudiates the contract nor is in default, there is no defect of consideration.<sup>1</sup>

**§ 575. When contract does not fix price.** The amount a vendor is entitled to recover for land contracted or conveyed may not be fixed by the contract; then, it must be ascertained by proof or by such other means as the contract points out. The time of the valuation may be material where the value fluctuates. Doubtless the value should be ascertained as of the date of the sale, when the vendor agrees to part with the land and the purchaser to take it, unless they indicate a different time. Where there was a covenant to pay for a surplus, if any, in a tract of land, without designating a time, it was held to refer to the time for paying for the rest, and that the value at that time was the criterion of damages, because the agreement provided that the vendor might have more than the price agreed for the rest, if "at the time of payment" he was dissatisfied with that price, and disinterested men should value the land higher.<sup>2</sup> On the question of value the admission of the purchaser may be considered. Where a [205] party has conveyed land on the parol promise of the grantee to convey to him certain other lands, which such grantee refused to do, it has been held that the grantor was entitled to recover the value of his conveyance upon an implied promise;

<sup>1</sup> *Gillespie v. Battle*, 15 Ala. 276; *Cope v. Williams*, 4 id. 362; *Johnson v. Hanson*, 6 id. 351; *Rhodes v. Storr*, 7 id. 346. Compare *Bates v. Terrell*, id. 129.

<sup>2</sup> *Keas v. McMillan*, 2 J. J. Marsh. 12; *Means v. Milliken*, 33 Pa. St. 517. In this case a debtor conveyed land to his creditor in satisfaction of his indebtedness, under a verbal agreement that the debtor should have all the profit on a resale within five years, over and above the amount of his debt with interest, etc.; before the

expiration of the five years the grantor gave notice to the other party to sell, but the grantor had previously disposed of the property. Held, in an action to recover the difference between the amount of the debt and interest and what the property might have been sold for, that the damages were to be estimated by what it would have produced at the time notice was given to sell, and not by the highest price that could have been procured at any time during the five years.

and that the plaintiff might prove, on the question of value, the worth of the land that the defendant agreed to convey, not as a basis of recovery, but as a declaration on the subject of value.<sup>1</sup> If the title to land conveyed in part payment of other land fails, the damage is the value of such land at the time it was conveyed, with interest. Statements of value made by the defendant during the negotiations and the consideration expressed in the deed are competent evidence of its value.<sup>2</sup> Where a party refuses to convey land contracted in exchange he is liable on the contract for the value at the time of the breach.<sup>3</sup> If one of the parties has executed and recorded his deed, and made a tender of it to the other, who makes no offer to reconvey, but repudiates his contract, the one who has performed may recover the expense to which he was put before such repudiation, and the value of the property conveyed. The defendant cannot mitigate the damages by showing that the property was sold on judicial process subsequent to the making of the contract, it having been conveyed subject to the lien pursuant to which the sale was made.<sup>4</sup> If the purchaser fails to erect a house, which was to be the consideration for the conveyance of land, the damage is the difference in the value of the house as it was to be built and of the property to be conveyed.<sup>5</sup> A purchase by the acre of a tract lying on both sides of a river does not bind the pur-

<sup>1</sup> Bassett v. Bassett, 55 Me. 127; Greenwood v. Hoyt, 41 Minn. 381; Nugent v. Teachout, 67 Mich. 571; Dikeman v. Arnold, 78 id. 455, 468. See King v. Brown, 2 Hill, 485; Kneeland v. Fuller, 51 Me. 518; also, Basford v. Pearson, 9 Allen, 387.

<sup>2</sup> Donlon v. Evans, 40 Minn. 501.

If the title is decreed to be in a third person its market value at the time the decree is made governs. Stewart v. Jack, 78 Iowa, 154.

<sup>3</sup> Devin v. Himer, 29 Iowa, 297; Burr v. Todd, 41 Pa. St. 206; Combs v. Scott, 76 Wis. 662; Plummer v. Rigdon, 78 Ill. 222.

In Brigham v. Evans, 113 Mass. 538, the defendant agreed to exchange land for land and horses

owned by the plaintiff. An appraisal was to be made, and either party was to pay the balance found in the other's favor. The horses were appraised in excess of their value, judged by a sale of them subsequently made. On defendant's refusal to convey the damage was held to be the difference between the value of the property and the sum plaintiff would have received for it if there had been no breach; the price secured at the sale was not to govern the jury in determining that value, but was to be considered.

<sup>4</sup> Zimmerman v. Galbraith, 4 Penny. (Pa.) 297.

<sup>5</sup> Laraway v. Perkins, 10 N. Y. 371.

chaser to pay for the land in the river, though it passes by the deed.<sup>1</sup> A grantor who reserves "one-eighth part of all the minerals or oil product produced on or from" the land conveyed is entitled to that proportion of the oil raised to the surface by his grantee, without deduction for the cost of getting it there. The measure of damages for its non-delivery is the market value at the time demand was made, with interest from that date. The rule which governs when there is a failure to deliver stocks does not apply.<sup>2</sup> A purchaser who agrees to assign a mortgage which he covenants shall be a valid and subsisting first lien on property worth a stated sum does not discharge his obligation by assigning the mortgage without the stipulation as to the value of the property covered by it, or as to its priority as a lien. In an action upon his covenant, the assignment being made to secure the mortgagor's notes, which were also assigned, he is entitled to have the value of the notes allowed in diminution of the damages, such value to be determined by the financial condition of their makers at the time of the trial, not when the assignment was made.<sup>3</sup>

**§ 576. Conveyance in consideration of non-pecuniary covenants.** A covenant by a railroad company, in consideration of the grant of a right of way through land, to erect a flag-station convenient to the grantor's house, and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land, and binds the grantee's assignee, who has notice.<sup>4</sup> The measure of damages for its breach is the difference between the value of the lands when suit is brought, and what their value would have been had all the stipulations in the contract been substantially performed; or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and if performed would have increased its market value. This appreciation was within the legal, if not the actual, contemplation

<sup>1</sup> Daniels v. Cheshire R. Co., 20 N. H. 85.

<sup>2</sup> Union Oil Co.'s Appeal, 3 Penny. (Pa.) 504.

<sup>3</sup> Smith v. Holbrook, 82 N. Y. 562.

<sup>4</sup> Gilmer v. Mobile & M. Ry. Co., 79 Ala. 569; S. C., 58 Am. Rep. 623; Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422.



of the parties. Its loss was the natural and proximate result of the breach of the contract.<sup>1</sup> In a Pennsylvania case there was a breach of a contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through plaintiff's land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. The supreme court, by Agnew, J., said: "Instead, then, of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question would be upon the additional value which would accrue to the plaintiff's land in the event of erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, for these are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract."<sup>2</sup> In an Iowa case the parties exchanged lands, defendant agreeing, as a part of the consideration, to make improvements on other lands of his adjoining those conveyed to plaintiff. In an action to recover on account of the partial failure of the consideration in not making the stipulated improvements, it was alleged that by reason thereof there was a difference of \$5,000 in the value of the land conveyed. These damages were held to be actual, not speculative.<sup>3</sup> A covenant by the grantee in a deed of the right of way through an eighty-acre

<sup>1</sup> *Mobile & M. Ry. Co. v. Gilmer*,  
*supra*; *Watterson v. Alleghany V. R. Co.*, 74 Pa. St. 208; *Louisville, etc.*  
*Ry. Co. v. Neafus* (Ky.), 18 S. W. Rep.  
1030.

<sup>2</sup> *Watterson v. Alleghany V. R. Co.*,  
*supra*.

<sup>3</sup> *Wilson v. Yocum*, 77 Iowa, 569.

tract of land that the water on one side of the road should be made to run on the same side instead of through cattle-guards, runs with the land; and in an action for its breach the damages are not restricted to those inflicted on the tract of land described in the deed, but extend to other land then owned as part of the same tract by the grantor.<sup>1</sup> If a vendee violates his covenant not to erect a tenement house on the granted premises the vendor may recover such damage as he has sustained thereby. The measure is not the difference between the value of the complainant's house as it was affected by the tenement and the value it would have possessed if the lot on which the latter was built had remained vacant, if there is no evidence that he desired to sell. The diminution of the value of the complainant's house for occupation is the standard by which to measure his compensation. In such a case future damages will not be assessed in a suit for an injunction.<sup>2</sup> On the breach of a condition subsequent the grantor may recover the value of the land and the rents from the time of instituting suit, but not anterior thereto unless he has previously re-entered.<sup>3</sup> If there is a failure to deliver property which was to be accepted as part of the consideration for land, the damages are measured by its value at the time specified for its delivery, with interest from that date less the amount due on the purchase price.<sup>4</sup>

§ 577. **Interest on purchase-money.** If the vendee is in possession under his purchase he will generally be charged with interest on the purchase-money after it has become due, even where the completion of the sale is delayed in pursuance of the contract on account of the title, or by the acquiescence of the vendee;<sup>5</sup> unless he keeps the money in hand idle, to be paid when the vendor becomes entitled to it.<sup>6</sup> A purchaser who contracted to pay the purchase-money at a future named day, or as soon thereafter as incumbrances are removed, is not

<sup>1</sup> Peden v. Chicago, etc. Ry. Co., 78 Iowa, 131; S. C., 73 id. 328.

<sup>2</sup> Amerman v. Deane, 57 N. Y. Super. Ct. 175.

<sup>3</sup> Gulf, etc. Ry. Co. v. Dunman, 74 Texas, 265.

<sup>4</sup> Rayner v. Jones, 90 Cal. 78.

<sup>5</sup> Brockenbrough v. Blythe's Ex'r,

3 Leigh, 619; 2 Addison on Cont., § 527.

<sup>6</sup> Id.; Hampton v. Egleberger, 2 Bailey, 520.

bound, without an express stipulation, to see to their removal; but if he takes possession and remains in the uninterrupted enjoyment of the land, he is liable for interest after the day appointed for payment although the incumbrances have not been removed, unless it appears that he had laid by the money which remained unemployed and unprofitable in order to meet the payment when they should be removed.<sup>1</sup>

<sup>1</sup> *Id.* The court say: "The case of *Rutledge v. Smith*, 1 McCord Ch. 403, will serve as an illustration of the principle, whilst its application points out an exception founded on the principle itself. There the defendant purchased a house and lot at auction for cash, and placed the money in [206] the hands of an agent to pay the whole amount; but the agent, finding that there were, as in this case, legal incumbrances upon it, retained a part of the same until they should be removed; and that not having been done a considerable time after, he returned this balance to the defendant, who had taken possession of the house immediately after the purchase. And it was held that she was liable for interest on this balance from the time she received it from the agent, but not whilst it remained in his hands; because she was ignorant that it so remained there, and could have derived no profit from it. And if it had been shown in this case that Egleberger laid by the amount due to the plaintiff to meet the demand when the incumbrances should have been removed, he would doubtless have been exempted from the payment of interest. But that is not pretended. It was insisted by counsel for the motion that until the plaintiff had discharged the incumbrances, which he considered as a condition precedent, she was not entitled to receive the principal, and hence it was con-

cluded that she was not entitled to interest on what the defendant had a right to retain. This argument has been already sufficiently answered. His liability arises out of the profit which he derived from the use and occupation of the lands, and the consequent loss to the plaintiff."

The grantees of certain lands had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be kept inclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected the wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for its breach. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiff was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall; held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of the contract and what it would have been if the contract had been performed, under the circumstances of the case, the amount that it would cost to build the wall was not the correct measure of damages. *Wigsell v. School for Indigent Blind*, 8 Q. B. Div. 357.

## SECTION 2.

## PURCHASER AGAINST VENDOR.

§ 578. **Measure of damages in England.** The rule [207] of damages against a vendor who fails to perform his contract to convey has been subject to some diversity of decision. While the general rule that the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled, is recognized, it is relaxed, and an exception admitted in favor of a vendor who makes a contract to sell and convey in good faith, believing himself to be the owner of the property, when he is afterwards incapable of performing by reason of a defect in his title of which he was not aware. The damages in such a case are merely nominal. The vendee can only recover payments made with interest, and expenses incurred in the investigation of the title. This exception was first admitted in *Flureau v. Thornhill*,<sup>1</sup> in which it was said by Chief Justice De Grey: "If the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These [contracts of sale] are merely upon condition, frequently expressed but always implied, that the vendor has a good title; if he has not, the return of the deposit with interest and costs is all that can be expected." This case has been followed in many cases in England and this country. These subsequent cases define more precisely, but not always consistently, the scope of the exception. The mild and exceptional rule, as supported by the weight of [208] authority, it is believed, is that above stated; it is confined to cases of inability to perform arising from a discovery after the contract of a previously unsuspected defect in the vendor's title.

In England the cases indicate that the doctrine and measure of damages in *Flureau v. Thornhill* is accepted as the rule, and any departure by allowing a recovery under a more liberal



standard for the vendee is exceptional, if, indeed, they do not tend to the conclusion that it is the exclusive rule, and put a vendee to his action for deceit, if he seeks enhanced damages on the ground of fraud. It cannot be said that the courts there have reached that point, but the following observations of Lord Chelmsford in *Bain v. Fothergill*<sup>1</sup> show the tendency in that direction: "I fully agree in the doubt expressed by Mr. Justice Blackburn in *Sikes v. Wild*<sup>2</sup> as to the soundness of the exception in *Hopkins v. Grazebrook*<sup>3</sup> and in the observations which follow the expression of that doubt. The learned judge said: 'I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit; but surely it cannot alter the effect of the contract itself.' . . . Upon a review of all the decisions on the subject, I think that the case of *Hopkins v. Grazebrook*<sup>4</sup> ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the court of exchequer in the present case is right, whether it falls within the rule established by *Flureau v. Thornhill*, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover [209] damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." *Bain v. Fothergill* was decided in the house of lords in 1874, and the opinions contain a thorough analysis and comparison of all the English cases on the point under consideration. F. was in possession, under a written agreement, of a mining royalty for a lease of which he had taken an assignment. One of the stipulations was that H. (the person with whom the agreement was originally made) should not assign without the consent of the lessors. They

<sup>1</sup> L. R. 7 Eng. & Ir. App. 158.<sup>2</sup> 6 B. & C. 31.<sup>3</sup> 1 B. & S. 587.<sup>4</sup> *Id.*

were ready to consent to the assignment to F., provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject he delayed doing so. F. entered into a contract with B. to sell his interest in the royalty, but it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B.; B. brought an action against F. for its non-performance, and it was held that he could recover only the expenses he had incurred.<sup>1</sup> The general rule there being to give no more [210] than nominal damages and the expenses of investigating the title, except in a clear case of bad faith on the part of the vendor, there is the anomaly of aggravating the damages in an action upon contract on the ground of fraud. The anomaly, however, goes no farther than to secure to the vendee full compensation for the injury he sustains, according to the standard on other contracts of sale, namely, the value of the bargain. The cases are not numerous in England in which the

<sup>1</sup> Mr. Justice Denman dissented, and thus stated the facts on which his dissent was placed: "It appears that when the contract of the 17th of October, 1867, was signed, the defendant, Fothergill, knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interest to the plaintiffs. The plaintiffs were not informed either of the necessity or of the non-existence of such consent. It further appears that before the contract was signed the defendants had had notice, through their solicitor, that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated

to the plaintiff, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that under the circumstances it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the defendants to rely upon the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078. I think that the contract in this case did not go off through the *discovery* by the defendants that they could not make a good title, but by reason of the over-sanguine expectation on the part of Mr. Fothergill that an obstacle which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau v. Thornhill* does not apply."

increased damages have been allowed. The first was decided in 1826, and those which followed were based upon it. The original case has now been overruled; and as a consequence the authority of the subsequent cases is shaken.<sup>1</sup>

<sup>1</sup> *Hopkins v. Grazebrook*, 6 B. & C. 31, is the case which introduced the exception to the rule of damages laid down in *Flureau v. Thornhill*, and *Bain v. Fothergill*. Lord Chelmsford thus criticises it and the cases which followed: "The decision itself in *Hopkins v. Grazebrook* cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbott, that 'the defendant had entered into a contract to sell without the power to confer even the shadow of a title,' is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins v. Grazebrook* did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau v. Thornhill*, and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate enters into a contract for the sale of it. It is not correct to say, with Lord St. Leonard in his *Vendors and Purchasers* (14th ed., p. 359), that *Hopkins v. Grazebrook* has not been followed. It has been recognized in several cases since, and in one, to which I shall presently refer, it has been expressly followed. In *Robinson v. Harman*, 1 Exch. 850, already mentioned as having sanctioned the decision in *Flureau v. Thornhill*, Baron Parke said: 'The present case comes within the rule of the common law,

and I cannot distinguish it from *Hopkins v. Grazebrook*.' And Baron Alderson and Baron Platt expressed the same opinion. In *Pounsett v. Fuller*, 17 C. B. 660, *Hopkins v. Grazebrook* was treated as a valid authority by all the judges, the question which they considered being whether the case fell within *Flureau v. Thornhill*, or the exception in *Hopkins v. Grazebrook*, and they decided that it was within the former case. But in the case of *Engel v. Fitch* the court of queen's bench, L. R. 3 Q. B. 314, and afterwards in the exchequer chamber, L. R. 4 Q. B. 659, 664, proceeded expressly on the cases of *Hopkins v. Grazebrook* and *Robinson v. Harman*, the chief baron quoting the very words of the lord chief justice, and relying on those cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on the completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of expense. The purchaser brought an action upon the contract of sale, and it was held that, as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and expenses of investigating the title, but damages for the loss of his

§ 579. **Conflict of American decisions on measure of damages.** The doctrine of the American courts has been [211] less liberal to the vendor. The general rule is that usu- [212]

bargain; and that the measure of such damages was the profit which it was shown he would have made upon a resale. It was after this decision in *Engel v. Fitch* that the plaintiff in error declined to argue the present case in the exchequer chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. Notwithstanding the repeated recognition of the authority of *Hopkins v. Grazebrook*, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by *Flureau v. Thornhill* with respect to damages upon the breach of a contract for the sale of a real estate; for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court in *Hopkins v. Grazebrook* engrafted upon the rule in *Flureau v. Thornhill* has always been taken to be this: that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain."

Mr. Baron Pollock said: "In *Robinson v. Harman*, 1 Exch. 850, the defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engel v. Fitch*, in which there was given an elaborate and exhaustive judgment of the court of queen's bench, confirmed by the exchequer chamber, the defendants, who were mortgagees of a lease but not in possession, sold it to the

plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up; and farther, that the defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances the judges in the queen's bench held that the plaintiff was entitled to recover, not merely the deposit and expense of investigating the title, but also the damages for the loss of his bargain; and in giving the grounds for their judgment on the particular case said that 'the rule in *Flureau v. Thornhill* can have no application where the failure either to make out a title or to give possession arises not from inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense.' It was urged by the learned counsel for the plaintiffs in error that the rule laid down in *Flureau v. Thornhill* was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject-matter to which it is applied differs also. It is observable, in following the history of the rule in question, that when it was first laid down in *Flureau v. Thorn-*



ally applied, adequate compensation for the actual injury or, [213] as it is briefly expressed, damages for the loss of the bargain. In some jurisdictions there is no deviation from this

hill the whole question of the proper measure of damages had not received from our courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in *Co. Litt.*, p. 102a, and by *Noy*, in his *Maxim*, c. 42, applied; but assuming that the difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and of real property.

"In the first place, a man who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that, in the majority of cases, the goods he is selling are intended for resale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties. With real estate the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the court in *Engel v. Fitch* (L. R. 3 Q. B. 314; id. 4 Q. B. 659), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor." [In the particular case the vendor knew the difficulty, and

did not communicate it to the vendee; his good faith could therefore only have been inferred from the fact that he forgot to mention it, or omitted to do so by under-estimating its importance.]

"Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined is unusual." [When a vendor contracts to sell in this unusual way, however, he is exempt from damages, if it happens unexpectedly that his vendor will not confer the power to fulfill. See *Hopkins v. Grazebrook*, which was held to be incorrectly decided. *Sikes v. Wild*, 1 B. & S. 587; 4 id. 421; *Walker v. Moore*, 10 B. & C. 416.] "It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has a good title; and that if, on examination of the abstract, this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles; but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale, made on the footing of that decision, was correct."

Lord Hatherley, also favoring the judgment which was pronounced,

rule on account of good faith and inability to perform [214] resulting from an unsuspected defect in the vendor's title; there the symmetry of the law relating to sales is preserved.<sup>1</sup>

said: "The reasons given for the judgment in *Flureau v. Thornhill* were certainly not altogether satisfactory, because the lord chief justice is said, upon that occasion, to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which Mr. Justice Blackstone added, that 'these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.' That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract" [and, it may be added, compensation for any defect of title. *Mestaer v. Gillespie*, 11 Ves. 621-640; *Mortlock v. Buller*, 10 id. 292; *Wood v. Griffith*, 1 Swanst. 54; *Milligan v. Cooke*, 16 Ves. 1; *Seaman v. Vawdrey*, id. 390; *Painter v. Newby*, 11 Hare, 26; *Woodbury v. Luddy*, 14 Allen, 1]. "Therefore the reason is, not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my

noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper so to do; but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one."

*Bain v. Fothergill* was followed in *Rowe v. School Board for London*, 36 Ch. Div. 619, where it was ruled that there is no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate.

<sup>1</sup> *Hartzell v. Crumb*, 90 Mo. 629; *Bier v. Fretz*, 32 Kan. 329; *Tracy v. Gunn*, 29 id. 508, intimating a dis-

Titles to real estate in this country are as a general thing less complicated, more readily investigated, and, by our jurisprudence, depend on rules which are less refined and abstruse than those which surround the questions which arise on an English title. The reasoning upon which the damages have been made merely nominal against a defaulting vendor who has acted in good faith, and been prevented from performing by unforeseen causes, has not been entirely satisfactory even to judges who have applied that rule in consequence of the supposed weight of general or local authority. The difficulty of ascertaining the state of the title, either in England or in this country, may well make both of the parties cautious, but it is a difficulty which they must surmount; and whether the loss is made to fall on one or the other, the state of the title is involved in every sale, and at some stage of the negotiation, or of the steps taken with a view to performance, is examined and ascertained. The vendor has the means of ascertaining his title, and where he undertakes absolutely to convey a particular estate, it is more consistent with the responsibility which the law attaches to all other undertakings to impose [215] the obligation which it imports, and the liability to make full compensation on default. The reasons which govern the measure of damages on breach of the covenants for title in deeds have but slight application, considering the brief period during which these contracts operate.

§ 580. **Same subject.** In an action in Maine upon such a contract the law of damages was thus pointedly discussed by Peters, J.:<sup>1</sup> "The general rule of damages in this form of action is well settled. If the plaintiff had paid nothing down, and the land was worth at the date of the breach more than he was to give for it, the difference would be his profit, and

approval of *Lister v. Batson*, 6 id. 484; *Doherty v. Dolan*, 65 Me. 87; 420; *Muenchow v. Roberts*, 77 Wis. 305; *Hopkins v. Yowell*, 5 Yerg. 305; 520; *Wells v. Abernethy*, 5 Conn. 647; *Shaw v. Wilkins*, 8 Humph. 647; 222; *Hopkins v. Lee*, 6 Wheat. 109; *Barbour v. Nichols*, 3 R. I. 187; *Nichols v. Freeman*, 11 Ired. L. 99; *Lee v. Russell*, 8 id. 526; *Spruell v.avenport*, 5 id. 145. See *Fuller v. Reed*, 38 Cal. 99.

<sup>1</sup> *Doherty v. Dolan*, 65 Me. 87.

*McKee v. Brandon*, 3 Ill. 339; *Buckmaster v. Grundy*, 2 Ill. 310; *Gale v. Dean*, 20 Ill. 320; *Cannell v. McClean*, 6 Har. & J. 297; *Bryant v. Hambrick*, 9 Ga. 133; *Hill v. Hobart*, 16 Me. 164; *Warren v. Wheeler*, 21 Me.

he could recover that amount. If there was no difference between the contract price and the value of the land when it should have been conveyed, and nothing was paid, then his damages could be nominal only; or if, in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full, he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment, and the land worth less than the contract price at the time a conveyance should have been made, that the damages would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price, the vendor is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity.”<sup>1</sup> Referring to the English rule, he says: “Many of the American state courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by the individual members of the courts of that state. . . . The supreme court of the United States does not sustain the doctrine.”<sup>2</sup> . . . We do not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own state. Still it can hardly be regarded here as a new question. We think it is virtually [216] settled by decisions in analogous cases. In the case of personal property, the measure of damages has uniformly been based, in this state, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor.<sup>3</sup> The reason assigned in the New York cases (and in cases elsewhere) for the adoption of the rule there

<sup>1</sup> Warren v. Wheeler, 21 Me. 484; Hill v. Hobart, 16 Me. 164; Robinson v. Heard, 15 Me. 296; Russell v. Copeland, 30 Me. 332; Lawrence v. Chase, 54 Me. 196.

<sup>3</sup> Smith v. Berry, 18 Me. 122; Furlong v. Polleys, 30 Me. 491; Berry v. Dwinel, 44 Me. 255; Bush v. Holmes, 53 Me. 417; Stevenson v. Fuller, 75 Me. 324.

<sup>2</sup> Hopkins v. Lee, 6 Wheat. 109.



adopted is the analogy that is claimed to exist between actions for the breach of a covenant to convey land, and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title.<sup>1</sup> But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land and interest, the measure in this state is the value of the land at the time of the eviction.<sup>2</sup> Still, it is not to be admitted that a complete similitude exists between the two classes of covenants in their legal bearing and effect. There is less harshness in applying our rule to contracts to convey than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly v. Phelps*.<sup>3</sup> We think that the rule that we are disposed to adhere to as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is strongly tempted to avoid his agreement where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The [217] vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief afforded by our rule is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it." However, the principle on which

<sup>1</sup> *Baldwin v. Munn*, 2 Wend. 399; *Elder v. True*, 32 Me. 104, and cases  
*Peters v. McKean*, 4 Denio, 546. there cited.

<sup>2</sup> *Hardy v. Nelson*, 27 Me. 525; <sup>3</sup> 40 N. Y. 59.

damages were exceptionally reduced in *Flureau v. Thornhill* has been adopted as settled law in many of the states. Where this is the case the liability is not, perhaps, as much restricted as it is in England.<sup>1</sup>

**§ 581. English rule, when not applied.** If the person selling is in fault;—if he knew or should have known that he could not comply with his undertaking; if he, being an agent, contracted in his own name, depending on his principal to fulfill his contract merely because he had power to negotiate a sale; if he has only a contract of the owner to convey, or a bond for a deed; if his contract to sell requires the signature of a wife to bar an inchoate right of dower, or the consent of a third person to render his deed effectual; if he makes his contract without title in the expectation of subsequently being able to acquire it, and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons; or if he has title and refuses to convey, or disables himself from doing so by conveyance to another person,—in all such cases he is beyond the reach of the principle of *Flureau v. Thornhill*, and is liable to full compensatory damages, [218]

<sup>1</sup> *Snodgrass v. Reynolds*, 79 Ala. 452; *Baltimore B. & L. Society v. Smith*, 54 Md. 187; *Northridge v. Moore*, 118 N. Y. 419; *McCafferty v. Griswold*, 99 Pa. St. 270; *Allison v. Montgomery*, 107 id. 455; *Morgan v. Bell*, 3 Wash. St. 554; *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKean*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140; *Allen v. Anderson*, 2 Bibb, 415; *Goff v. Hawks*, 5 J. J. Marsh. 341; *Combs v. Tarlton's Adm'r*, 2 Dana, 464; *Seamore v. Harlan's Heirs*, 3 id. 410; *Herndon v. Venable*, 7 id. 371; *Foley v. McKeegan*, 4 Iowa, 1; *Sweem v. Steele*, 5 id. 352; *Thompson v. Guthrie*, 9 Leigh, 101; *Bitner v. Brough*, 11 Pa. St. 127; *McClowry v. Chrogan's Adm'r*, 31 id. 22; *McDowell v. Oyer*, 21 id. 417; *Hertzog v. Hertzog*, 34 id. 418; *McNair v. Compton*, 35 id. 23; *Saulters v. Victory*, 35 Vt. 351; *Hammond v. Hannin*, 21 Mich. 374; *Hall v. York*, 22 Tex. 641; *Margraf v. Muir*, 57 N. Y. 155; *Drake v. Baker*, 34 N. J. L. 358; *Wheeler v. Styles*, 28 Tex. 240. See *Combs v. Scott*, 76 Wis. 662, 670; *Dunnica v. Sharp*, 7 Mo. 71.

Section 3306 of the California Civil Code provides: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." See *Yates v. James*, 89 Cal. 474.

including those for the loss of the bargain.<sup>1</sup> This rule applies where the grantor expressly agrees to make a good title;<sup>2</sup> but not in an action at law where the invalidity of the contract sued upon is made a defense.<sup>3</sup> In a case in New York<sup>4</sup> Mason, J., thus discusses this rule of damages: "There has never seemed to me to have been any very good foundation for the rule which excuses a party from the performance of his contract to sell and convey lands because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule is placed. In England the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case upon this subject<sup>5</sup> Blackstone, J., said: 'These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title,'

<sup>1</sup> Tracy v. Gunn, 29 Kan. 508; Dikeman v. Arnold, 71 Mich. 656; S. C., 78 id. 455; Skaaraas v. Finnegan, 31 Minn. 48; Hartzell v. Crumb, 90 Mo. 629; Brigham v. Evans, 113 Mass. 538; Sanford v. Cloud, 17 Fla. 532, 554; Plummer v. Rigdon, 78 Ill. 222; Dunshee v. Geohegan, 25 Pac. Rep. 731 (Utah); Cade v. Brown, 1 Wash. St. 401; Chartier v. Marshall, 56 N. H. 478; Irwin v. Askew, 74 Ga. 581; Snodgrass v. Reynolds, 79 Ala. 642; Taylor v. Barnes, 69 N. Y. 430; Phillips v. Herndon, 78 Tex. 378; Muenchow v. Roberts, 77 Wis. 520; Carver v. Taylor, 53 N. W. Rep. 386 (Neb.); Allen v. Atkinson, 21 Mich. 351; Dustin v. Newcomer, 8 Ohio, 49; Trull v. Granger, 8 N. Y. 115; Engel v. Fitch, L. R. 3 Q. B. 314; S. C., 4 id. 659; Martin v. Wright, 21 Ga. 504; Cox v. Henry, 32 Pa. St. 18; Burr v. Todd, 41 id. 206; Grissom v. Sorrell, 8 Humph. 372; Foley v. McKeegan, 4 Iowa, 1; Sweem v. Steele, 5 id. 352; Pumpelly v. Phelps, 40 N. Y. 59; Brinckerhoff v. Phelps, 24 Barb. 100; Hopkins v. Lee, 6 Wheat. 109; Drake

v. Baker, 34 N. J. L. 358; Driggs v. Dwight, 17 Wend. 71; McNair v. Compton, 35 Pa. St. 23; Wilson v. Spencer, 11 Leigh, 261; Graham v. Hackwith, 1 A. K. Marsh. 423; Bush v. Cole, 28 N. Y. 261; Burwell v. Jackson, 9 id. 535; Dean v. Roesler, 1 Hilt. 420; Lewis v. Lee, 15 Ind. 499; White v. Madison, 26 N. Y. 124; Stephenson v. Harrison, 3 Litt. 170; Kirkpatrick v. Downing, 58 Mo. 32; Pringle v. Spaulding, 53 Barb. 17; Gibbs v. Champion, 3 Ohio, 335; Scott v. Reikel, 15 Up. Can. C. P. 200; Plummer v. Simonton, 10 Up. Can. Q. B. 220; Vallier v. Walsh, 6 Up. Can. C. P. 459; McConnell v. Dunlop, Hardin, 41; Gerault v. Anderson, 2 Bibb, 543; Davis v. Lewis, 4 id. 456; Morgan v. Stearns, 40 Cal. 434.

<sup>2</sup> Wall v. City of London Real Property Co., L. R. 9 Q. B. 249.

<sup>3</sup> Matthews v. Matthews, 133 N. Y. 679, reversing S. C., 62 Hun, 110.

<sup>4</sup> Pumpelly v. Phelps, 40 N. Y. 59.

<sup>5</sup> Flureau v. Thornhill, 2 W. Bl. 1078.

while in this country the rule is based upon the analogy between this class of cases and actions for the breach of covenant of warranty of title.<sup>1</sup> The rule of damages in an action for a breach of covenant of warranty of title is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times, and the courts meet with great embarrassment in settling it. These difficulties were considered and well expressed in the leading case in this state,<sup>2</sup> in which the court said: 'To find a [219] rule of damages in a case like this is a work of difficulty. None will be entirely free from objection, or will not, at times, work injustice. To refund the consideration, even with the interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture, and, by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?' There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A. purchases of B. a city lot for the purpose of building himself a dwelling or buildings upon it, and takes from B. a full covenant deed of the premises, covenanting to assure, or warrant and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B. is evicted by a paramount title ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages for the law to give one who

<sup>1</sup> Baldwin v. Munn, 2 Wend. 399;    <sup>2</sup> Staats v. Ten Eyck, 3 Cai. 111.  
Peters v. McKean, 4 Denio, 546.



holds a covenant to make good and to defend the title. The reasons assigned for this rule, in actions for breach of covenant of warranty of title, can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and, if he will go on and make expenditures under such circumstances, it is his own fault; [220] and, besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase of value of the property, as there is in these covenants in deeds which run with the land through all time. . . . These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated. I have referred to this matter simply as furnishing an argument against, in any degree, extending the rule, and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it." In this case the party contracting as vendor was a trustee having power to sell with the consent of a third person. He made the contract in his own name, and absolute in terms. Not being able to obtain the necessary consent, he was unable to perform, and was held liable for the difference between the value of the land and the price to be paid for it.

A similar case arose in New Jersey.<sup>1</sup> The vendor was not able to perform because the consent and concurrence of his wife was necessary. Beasley, C. J., said: "The defendant in this suit knew when he agreed to make a perfect title to this property that it was altogether uncertain whether he would be able to do so, for his ability to discharge his contract was dependent upon the consent of his wife. With a full knowledge of his power of performance being contingent, he entered into this absolute stipulation, and I think this circumstance should take this case out of the rule adopted in *Flureau v. Thornhill*. It may be quite reasonable that an implicit understanding should grow up between vendors and vendees of real estate that a vendor should not be responsible

<sup>1</sup> *Drake v. Baker*, 34 N. J. L. 358.

for secret flaws in the title of the property, and that such understanding should assume the form of a rule of law. But there seems no rational ground for the hypothesis that a similar relaxation of the general law exists in those cases in which a man agrees, in an absolute form, to do some act which he knows he has not the power to do without the assent of a third party. In the former class of cases there is a [221] semblance of good sense and public convenience in favor of the application of the rule excluding the liability in question, but in the latter class there is apparently none whatever." This view is not acquiesced in by the Pennsylvania, California and Iowa courts. In the former state a wife will not be indirectly coerced into a conveyance of her interest in land by awarding exemplary damages — that is, damages in excess of such as are compensatory under the English rule — against her husband for the breach of his contract; and his delay in notifying the intended purchaser of her refusal to join in a conveyance is not evidence of fraud; it was important only in determining the actual damage he sustained.<sup>1</sup> It is ruled in Washington that a party who contracts with a husband to purchase community property, knowing it to be such, does so with knowledge that the law forbids the latter to enter into a valid contract for its sale, unless his wife joins him, and that damages cannot be recovered for its breach.<sup>2</sup>

The exemption of the vendor from the severer rule of damages does not extend beyond his inability to perform his contract by reason of a defect in his title which was unknown to him at the time he made his engagement to sell. This rule will exclude all defaults that are wilful, or which arise from contingencies known to the vendor and of which he consciously assumed the risk.<sup>3</sup> In cases of this latter kind the contract is either made or violated in bad faith, or is speculative.<sup>4</sup> An agreement for exchange of lands performed on

<sup>1</sup> *Burk v. Serrill*, 80 Pa. St. 413; *Gale v. Dean*, 20 Ill. 320; *Dyer v. Donner v. Redenbaugh*, 61 Iowa, 269; *Dorsey*, 1 Gill & J. 440; *Pinkston v. Huie*, 9 Ala. 252; *Gibbs v. Jamison*, 12 id. 820; *Hammond v. Hannin*, 21 Mich. 374; *Thouvenin v. Lea*, 26 Tex. 235.

<sup>2</sup> *Holyoke v. Jackson*, 3 Wash. Ty. 235.

<sup>3</sup> *Drake v. Baker*, 34 N. J. L. 358.

<sup>4</sup> *Bryant v. Booth*, 30 Ala. 311. See

612; *Taylor v. Rowland*, id. 293.

one side is like a purchase after the consideration has been paid; and the value of the land agreed to be conveyed in exchange, at the time when the conveyance should have been made, is the measure of damages.<sup>1</sup>

§ 582. **Elements of damage under the milder rule.** Where only nominal damages can be recovered for the loss of the bargain the vendee is entitled to recover his deposit, any payments he may have made on the contract of purchase with interest, and expenses incurred in investigating the vendor's title.<sup>2</sup> But [222] interest will not be allowed where possession under the contract of purchase has been enjoyed, except for such time as there is a liability for the profits to another person.<sup>3</sup> The vendee may recover costs incurred, although not paid, if he makes allegation of them as *incurred* rather than as expenses *paid*;<sup>4</sup> and, among them, costs for searches relating to the title and for incumbrances, comparing the abstract with the deeds, and expense of journeys in the investigation of such

<sup>1</sup> *Bierer v. Fretz*, 32 Kan. 329; *Dikeman v. Arnold*, 71 Mich. 656; *Burr v. Todd*, 41 Pa. St. 206; *Faxon v. Davidson*, 2 Duer, 153; *Devin v. Himer*, 29 Iowa, 297; *Bender v. Fromberger*, 4 Dall. 436; *Brown v. Dickerson*, 12 Pa. St. 372; *King v. Pyle*, 8 S. & R. 166. See *Lacey v. Mar- nan*, 37 Ind. 168.

<sup>2</sup> *Baltimore Permanent B. & L. Society v. Smith*, 54 Md. 187; *North- ridge v. Moore*, 118 N. Y. 419 (expenses incurred in examining title recoverable although both parties knew that the vendor was not possessed of the title, it being supposed he would procure it); *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149; *Mor- gan v. Bell*, 3 Wash. St. 554; *Walker v. Moore*, 10 B. & C. 416; *Pounsett v. Fuller*, 17 C. B. 660; *Tyrer v. King*, 2 Car. & K. 149.

In *McConnel v. Hall*, 3 Pa. 53, a vendee paid down \$100 on a purchase of land, knowing at the time that the seller's agent had sold the land to another; on the seller being informed of the prior sale he ten-

dered back the \$100, but the vendee refused to accept it. In a suit by the latter on the contract he was held entitled to recover his payment, but without interest or costs, though the tender was not pleaded.

In *Tyrer v. King*, *supra*, an auctioneer entered into an agreement in behalf of A. to sell certain premises to B., without having communicated to A. that B. was in treaty for the premises; A. had previously sold them to another party, and therefore could not fulfill the contract so made with B. B. sued A. for nonfulfillment of his contract. Held, that under these circumstances B. was not entitled to recover damages for the loss of his bargain, but was entitled to recover £50 deposit and loss of the use and his expense to his attorney.

<sup>3</sup> *Thompson v. Guthrie*, 9 Leigh, 100.

<sup>4</sup> *Richardson v. Chasen*, 10 Q. B. 756. See *Sutton v. Page*, 4 Tex. 142, as to pleading.

title.<sup>1</sup> He may also recover expenses for preparing [223] papers with a view to the conveyance of the title.<sup>2</sup> And besides interest on the payments recovered he may have interest allowed on money kept idle after the day for consummation of the purchase, pending an endeavor by the vendor to clear the

<sup>1</sup> Baltimore Permanent B. & L. Society v. Smith, 54 Md. 187; Hodges v. Earl of Litchfield, 1 Bing. N. C. 492. In this case, in the vendee's action, he alleged that he had been put to great charges and expenses, amounting in the whole to a large sum of money, to wit, to the sum of 1,000*l.*, in and about the negotiation and agreeing for the purchase of said estate, and having the same conveyed; and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said article mentioned; and in and about his defense of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the court of chancery for compelling a specific performance by the plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same court, and in and about the making and performing of divers journeys, and otherwise respecting the said purchase; and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might or would otherwise have made and acquired, from using and employing the said sum of 1,000*l.* so paid by him as aforesaid, and other moneys provided and kept by the plaintiff for the completion of the said purchase, etc. The damages in respect to each "head of claim" were ascertained by an arbitrator. It was held

that the expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit at a time when it is uncertain whether there will be any contract or not. The charge for a survey was also disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out. There was a charge of 71*l.* 11*s.* 6*d.* for journey to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments. These were allowed. Tindal, C. J., said: "Unless judgments are searched for at an early stage of the proceedings great expense may afterwards be incurred unnecessarily, and, for the same reason, the comparison of deeds with the abstract should be made early." Under the third head, 194*l.* 4*s.* 11*d.* was claimed as plaintiff's costs as between attorney and client, *ultra* the costs as between party and party taxed to him in the suit in chancery. See Sandbank v. Thomas, 1 Stark. 306; Jones v. Dyke, Sugd. Vend. & Pur., App. 9; Webber v. Nicholas, Ry. & Moo. 419. In opposition, see Hathaway v. Barrow, 1 Camp. 151; Sinclair v. Eldred, 4 Taunt. 7; Jenkins v. Biddulph, 4 Bing. 160. Upon that claim the chief justice said: "We all think that the extra costs in chancery are not a damage which is a necessary consequence of the breach of this contract; . . . but the filing of a bill for enforcing a specific performance is one degree

<sup>2</sup> McNair v. Compton, 35 Pa. St. 23; Dumars v. Miller, 34 id. 319; Malaun v. Ammon, 1 Grant's Cas. 123.



title.<sup>1</sup> But he cannot recover for the expense he may have incurred in moving to the land, nor for improvements, whether of a permanent or temporary nature, nor for repairs. The vendee expends money in his own wrong if he takes possession and makes improvements before he has looked into the title and ascertained that it is likely to prove satisfactory,<sup>2</sup> unless he does so pursuant to the contract between him and his vendor.<sup>2</sup> He cannot recover, it has been held, even for repairs;<sup>4</sup> nor for expenses incurred prior to the contract; or of a survey; or for the preparation of conveyances before known objections to the title have been answered.<sup>5</sup> Nor can he recover the difference between his costs, taxed as between party and party, and his costs between solicitor and client in an unsuccessful suit by the vendor for specific performance;<sup>6</sup> nor the costs of a suit by himself as purchaser for specific performance where the bill has been dismissed without costs on the master reporting against the title.<sup>7</sup> And where a purchaser, upon the de-

removed from a consequence of the contract."

If the sale is made subject to the approval of a third party and there is no fraud or warranty of ownership, the expense of journeys cannot be recovered. *Dey v. Nason*, 100 N. Y. 166.

<sup>1</sup> *Sherry v. Oke*, 3 Dowl. Pr. 349; *Metcalfe v. Fowler*, 6 M. & W. 830.

<sup>2</sup> *Walton v. Meeks*, 120 N. Y. 79; *Chamberlain v. Brady*, 49 N. Y. Super. Ct. 484; *Cartin v. Hammond*, 10 Mont. 1; *Burnett v. Caldwell*, 9 Wall. 290; *Peters v. McKean*, 4 Denio, 546; *Walker v. Moore*, 10 B. & C. 416; *Hertzog v. Hertzog*, 34 Pa. St. 418; *Worthington v. Warrington*, 18 L. J. (C. P.) 350.

<sup>3</sup> *Gilbert v. Peteler*, 38 N. Y. 165; *Willis v. Wozencraft*, 22 Cal. 607.

<sup>4</sup> *Bratt v. Ellis*, Sugd., App. No. 5.

<sup>5</sup> *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492.

<sup>6</sup> *Id.*

<sup>7</sup> *Malden v. Fyson*, 11 Q. B. 292. M. agreed with F. to purchase land

of him. On production of F.'s title M. objected to it. F. insisted that it was good, and gave M. notice that he should sell at M.'s risk. M. then filed a bill for specific performance, and the question of title was referred by the court of chancery to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side; that being the practice of the court of chancery in such cases. Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. Lord Denman, C. J., said: "The dismissal of the bill was a matter of course when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfill his own engagement. But the plaintiff has brought this action to recover, amongst other things, the

livery of an abstract showing an apparently good title, [224] resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale, there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and the purchaser being [225] equally negligent in reselling before he had tested its accu-

costs to which he was put in the prosecution of his unsuccessful suit. Some of us thought that it might be important, in one view of the case, to inquire into the practice in chancery; and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the court of chancery does not possess the power to award costs to the plaintiff under circumstances involving fraud in any part of the negotiation; but without fraud the rule appears to be inflexible that the unsuccessful plaintiff, though not liable to costs, does not recover them in chancery.

"The plaintiff asserts that these costs are the natural consequence of the defendant's breach of contract, coupled with his threat to resell the estate, and as such are recoverable. He rests his claim on the practice of chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered, in an action at law for the damages resulting from that breach of contract; and urges that if he cannot so make good his loss at the expense of him who caused it he has no remedy. On the other hand, the general rule is set up that the right to costs must always be considered as finally settled in the court where the question is adjudicated or to which it is accessory. Several cases were quoted to this effect. And this principle was ad-

mitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court. We are of opinion that this case falls within the same principle. The general rule of the court of chancery, a court having full discretion, must be intended to apply itself as an adjudication in every particular case which falls within it. In the case of *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492, in which the plaintiff claimed as damages extra costs of a bill for specific performance, Tindal, C. J., says: 'The extra costs in chancery are not a damage which is a necessary consequence of the breach of this contract.' 'The filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases.'"

In *Marvin v. Prentice*, 94 N. Y. 295, land was conveyed absolutely to secure a loan. The grantee refused to reconvey on tender of the amount due. A reconveyance was decreed, and the owner then sought to recover for the depreciation in the value of the property during the litigation and his costs and expenses therein. He was unsuccessful.

raey.<sup>1</sup> So where a vendor was prevented from performing by the refusal of a third person to accept substituted security for an incumbrance upon the property, according to a previous parol promise, and negotiations were continued after breach of the contract in the hope that some new arrangement might be come to, the expenses incurred to effectuate that abortive plan were not recoverable; they were held not sufficiently proximate.<sup>2</sup>

§ 583. **Recovery on parol contract.** In Pennsylvania it was decided in a late case, an action for breach of a parol contract to convey land, that the plaintiff might recover the consideration paid, and compensation for improvements made in reliance upon the contract, less a reasonable charge for rent, unless there was fraud on the part of the vendor; and that the failure to convey was not such a fraud, although he had power to convey.<sup>3</sup> The vendor must restore the vendee to the condition in which he found him; but he is not bound to compensate him for the loss of a bargain. In order that the latter may recover he must affirmatively show that the former has actually broken his contract.<sup>4</sup> In Texas if a party makes a parol agreement for the sale of lands, and puts the purchaser in possession, and afterwards takes advantage of the contract being void by the statute of frauds, he is bound to pay for the improvements. If in such an agreement the vendor stipulates [226] to pay for such improvements, but no stipulation is

<sup>1</sup> Walker v. Moore, 10 B. & C. 416.

<sup>2</sup> Sikes v. Wild, 4 B. & S. 421; S. C., 1 id. 587.

In Pounsett v. Fuller, 17 C. B. 660, A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, and C. refusing to confirm, B. brought an action against A. for breach of the contract. Held, that he was only entitled to recover nominal damages and expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavors to substitute a new contract on the failure of the

original bargain. Jervis, C. J., said:

"If it could have been established that the contract being about to go off, on the representation or suggestion of Fuller, the plaintiff's attorney had prepared the deed of covenant for the purpose of supplying the defect in the title, and of carrying out the original contract, that would have been an expense incurred in endeavoring to perfect a title which was imperfect, and the defendant would have been liable."

<sup>3</sup> Harris v. Harris, 70 Pa. St. 170; Welch v. Lawson, 32 Miss. 170.

<sup>4</sup> Allison v. Montgomery, 107 Pa. St. 455.

made as to rents, on his refusal to complete the agreement, and he is sued for the improvements, the rents will not be allowed as a set-off.<sup>1</sup> Where a vendee goes into possession and makes valuable improvements under a parol contract, and specific performance is successfully resisted by the vendor because the contract is not in writing, equity will in general decree compensation for improvements.<sup>2</sup> In Washington if the vendor violates his parol contract by formally conveying the property to a third person he is liable for the value of the land at the time the breach was committed and for the loss resulting to the vendee from the purchase of material designed to be used in making further improvements on the premises.<sup>3</sup> On the breach of a contract to sell all the trees standing on a tract of land which are adapted for a specified purpose at an agreed price per thousand feet, their purchaser may, after a sale of all the timber to another party, recover the market value of such trees as were included in his purchase, less the price he was to have paid for them, with interest on the balance, no question as to the right to recover for the loss of profits being involved.<sup>4</sup> The liability of a vendor who refuses to perform a parol contract for the sale of lands cannot, in a suit to recover the purchase-money, be mitigated by showing a depreciation in their value subsequent to the making of it.<sup>5</sup> Where there has been no written contract of sale binding on the vendor, but the matter rests on an oral agreement invalid by the statute of frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty as money paid upon a consideration that has failed.<sup>6</sup> Where one owning a life estate in land made a parol

<sup>1</sup>Thouvenin v. Lea, 26 Tex. 612; Courtlandt, 1 Johns. Ch. 273. See Taylor v. Rowland, id. 293; Goodwin v. Lyon, 4 Port. 297. See Lister v. Batson, 2 Kan. 420; and an intimation of its disapproval in Tracy v. Gunn, 29 id. 508.

<sup>2</sup>Thomas v. Kyles, 1 Jones' Eq. 302; Goodwin v. Lyon, 4 Port. 297;

Boze v. Davis, 14 Tex. 331; Albea v.

Griffin, 2 Dev. & B. Eq. 9; Herring

v. Pollard, 4 Humph. 362; Mathews

v. Davis, 6 id. 324; Parkhurst v. Van

<sup>3</sup>Cade v. Brown, 1 Wash. St. 401.

<sup>4</sup>Clemants v. Beatty, 87 Ala. 238;

Mackey v. Olssen, 12 Ore. 429.

<sup>5</sup>Shryer v. Morgan, 77 Ind. 479.

<sup>6</sup>Cases cited in n. 2; Nicholson v.

Wadsworth, 2 Swanst. 387. See

Welch v. Lawson, 32 Miss. 170;

Hertzog v. Hertzog, 34 Pa. St. 418.



agreement to lease the same for a term of years, and died before the term was to commence and before a lease was executed, the other party was entitled to recover from the administrator no more than his actual damages, namely, money paid on the agreement and interest; he could not recover the value of his bargain.<sup>1</sup> If the owner of lands agrees with another to give him a portion of the purchase-money, and also a certain parcel of land for his services in effecting a sale of the land of the former, there being no note or memorandum in writing of the promise, the whole contract, as well for the money as the land, is void; and no action will lie for either. In such case the injured party has no remedy at law upon the contract; he may, however, ignore it, and maintain his action to recover any money paid, and the value of the services rendered.<sup>2</sup> But if the other party is able and willing to fulfill, the party paying in money or services has not the option to disaffirm the contract.<sup>3</sup>

**§ 584. Elements of damage where *Flureau v. Thornhill* does not apply.** Where damages for loss of the bargain are recoverable by the vendee he is entitled to recover the difference between the contract price and the actual or market value of the land at the time when the conveyance should have been made, whether then enhanced by improvements or otherwise, and all other damages which result from the vendor's breach of the contract; further, he must place his vendee, as near as money can do so, in the same position in which he would have been if he had obtained that for which he contracted.<sup>4</sup> This rule applies to one who undertakes to

<sup>1</sup> *McClowry v. Chrogan's Adm'r*, 31 Pa. St. 22.

<sup>2</sup> *Fuller v. Reed*, 38 Cal. 99.

<sup>3</sup> *Shaw v. Shaw*, 6 Vt. 69; *McKinney v. Harvie*, 38 Minn. 640; *Plummer v. Buckman*, 55 Me. 105; *Gray v. Gray*, 2 J. J. Marsh. 21; *Ketchum v. Evertson*, 13 Johns. 359.

<sup>4</sup> *Kempner v. Cohn*, 47 Ark. 519; *Skaaraas v. Finnegan*, 31 Minn. 48 (the time when the agreement was made is that at which the market value of the property is to be determined, not the time of the purchas-

er's eviction by the true owner); S. C., 32 id. 107 (improvements made in good faith recovered for); *Kirkpatrick v. Downing*, 58 Mo. 32; *Hartzell v. Crumb*, 90 Mo. 629; *Combs v. Scott*, 76 Wis. 662; *Muenchow v. Roberts*, 77 id. 520; *Wilson v. Robertson*, 1 Brun. Coll. Cas. 109; S. C., 1 Overt. 464 (the value of the land was determined as of the time of the trial); *Sanford v. Cloud*, 17 Fla. 532, 554; *Plummer v. Rigdon*, 78 Ill. 222; *Chartier v. Marshall*, 56 N. H. 478; *Yokom v. McBride*, 56

procure a conveyance from another and fails on account of the refusal of that person,<sup>1</sup> and also to one who assumes, without authority, to act as agent for the owner and makes a contract as such to convey.<sup>2</sup> The vendee may not only recover payments he may have made, with interest, and expenses of investigating the title, but damages with reference to an enhanced value which he could make on a resale pursuant to an actual contract<sup>3</sup> or caused by improvements made by him.<sup>4</sup> Expenses incurred in getting a survey made of the estate or plans preparatory to the making of the contract, but before it was actually entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved of and before it is known whether

Iowa, 139; *Erickson v. Bennet*, 39 Minn. 326; *Turner v. Lord*, 92 Mo. 113 (the same rule applies in an action for the breach of a bond to convey as for the breach of the contract to be performed, so long as the penalty of the bond is not exceeded); *Allen v. Atkinson*, 21 Mich. 351; *Cannell v. McClean*, 6 Har. & J. 297; *Hopkins v. Yowell*, 5 Yerg. 305; *Dustin v. Newcomer*, 8 Ohio, 49; *Trull v. Granger*, 8 N. Y. 115; *Engel v. Fitch*, L. R. 3 Q. B. 314; *J. C.*, 4 id. 659; *Martin v. Wright*, 21 Ga. 504; *Cox v. Henry*, 32 Pa. St. 18; *Burr v. Todd*, 41 id. 206; *Foley v. McKeegan*, 4 Iowa, 1; *Pumpelly v. Phelps*, 40 N. Y. 59; *Drake v. Baker*, 34 N. J. L. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Sweem v. Steele*, 5 Iowa, 352; *Case v. Wolcott*, 33 Ind. 5.

<sup>1</sup> *Skaaraas v. Finnegan*, 31 Minn. 48; *S. C.*, 32 id. 107; *Gale v. Dean*, 20 Ill. 320.

In *New Haven & N. Co. v. Hayden*, 117 Mass. 433, the defendant agreed to secure for the plaintiff a right of way free of expense. On his failure to perform, plaintiff resorted to the usual proceedings and subsequently brought an action for the breach of the contract. The following items entered into the dam-

ages: 1. Land taken for the road-bed five rods in width, and also land outside that limit if it was required. 2. Damages for land taken for the use of the road and ordered paid by the commissioners, although payment had not been made. 3. Money paid for building farm bridges over the road and for building a bank wall if the land damages were decreased thereby to an amount equal to their cost. 4. The ordinary legal costs and compensation to attorneys and other agents for their services in settling the damages for land taken. The defendant was not liable for land taken exclusively for stations or for procuring material to be used in the construction of the road, nor for money paid to the public officers for their services in assessing damages to lands taken.

<sup>2</sup> *Godwin v. Francis*, L. R. 5 C. P. 295; *Spedding v. Nevell*, 4 id. 212; *Gibbs v. Jamison*, 12 Ala. 820; *Hammon v. Hannin*, 21 Mich. 374.

<sup>3</sup> *Engel v. Fitch*, L. R. 3 Q. B. 314; *Godwin v. Francis*, L. R. 5 C. P. 295; *Hopkins v. Grazebrook*, 6 B. & C. 31.

<sup>4</sup> *Witherspoon v. McCalla*, 3 Desaus. 245; *Thompson v. Kilcrease*, 14 La. Ann. 340; *Winters v. Elliott*, 1 Lea, 676.

objections raised to the title can be answered by the vendor.<sup>1</sup> If interest has been recovered on the purchase price, there cannot be a recovery for the loss of interest on money which has lain idle, nor for the loss of a lease made before notice of the vendor's refusal to comply with his contract.<sup>2</sup> If a vendor sells land to a third person he is liable to a previous purchaser for its value at the time of such sale.<sup>3</sup>

[228] Where the vendor's title is imperfect, and he is for that reason unable to perform his contract, but the vendee has perfected the title by extinguishing an incumbrance or buying in an adverse title, his damages will be limited to his outlay for this purpose,<sup>4</sup> and he can charge no more to the vendor for moneys expended in perfecting the title than would otherwise be recoverable for breach of the contract as damages.<sup>5</sup>

§ 585. **Defaulting vendee's rights.** If a vendee who has partly performed makes default, in consequence of which the sale fails of consummation, he is seldom entitled to relief or compensation for his part performance; he cannot recover a deposit or the money paid.<sup>6</sup> If the vendor has in his hands a sum paid him on the contract of purchase largely in excess

<sup>1</sup> *Hodges v. Earl of Litchfield*, 1 Scott, 443; 2 *Addison on Cont.*, § 529.

<sup>2</sup> *Kempner v. Cohn*, 47 Ark. 519.

<sup>3</sup> *Phillips v. Herndon*, 78 Tex. 378.

<sup>4</sup> *Kerley v. Richardson*, 17 Ga. 602; *Baker v. Corbett*, 28 Iowa, 317; *Hull v. Harris*, 64 Ga. 309. But compare *Martin v. Atkinson*, 7 Ga. 228.

<sup>5</sup> *Spring v. Chase*, 22 Me. 509; *Foote v. Burnett*, 10 Ohio, 334; *Diminick v. Lockwood*, 10 Wend. 142; *Donohoe v. Emery*, 9 Met. 68; *Davis v. Lyman*, 6 Conn. 255; *Cox's Adm'r v. Henry*, 32 Pa. St. 18.

<sup>6</sup> *Ex parte Barrell*, L. R. 10 Ch. App. 512; *Ketchum v. Evertson*, 13 Johns. 365; *Green v. Green*, 9 Cow. 46; *Battle v. Rochester City Bank*, 5 Barb. 414; *Davis v. Hall*, 52 Md. 673; *Estes v. Browning*, 11 Tex. 237; *Fuller v. Hubbard*, 6 Cow. 13; *Hudson v. Swift*, 20 Johns. 24; *Gillet v.*

*Maynard*, 5 id. 85; *Roach v. Waid*, 2 T. B. Mon. 142; *Essex v. Daniell*, L. R. 10 C. P. 538; *Power v. North*, 15 S. & R. 12; *Frost v. Frost*, 11 Me. 235; *Roonds v. Baxter*, 4 Me. 454; *Page v. McDonnell*, 46 How. Pr. 52; *Haynes v. Hart*, 42 Barb. 58.

In *Bullock v. Adams*, 20 N. J. Eq. 367, 374, Chancellor Zabriskie said: "It is common both in sales at auction and other sales to stipulate that the percentage or part paid on the contract shall be forfeited if the purchaser does not comply with his contract, and I am not aware of any case where the payment so made has been recovered at law, even where the vendor, upon resale, has received a higher price. I know of no principle upon which such payment can be recovered either at law or in equity."

of the damages sustained by him in consequence of the loss of the bargain he may retain it, because while the contract subsists the party in default cannot recover it, or any equivalent of it, in damages, the vendor not being in default.<sup>1</sup> Where the contract is terminated by the vendor for the vendee's default, according to the English doctrine, the [229] question whether a deposit is forfeited depends on the intention of the parties. A. agreed to demise a house to B. for a term in consideration of 300*l.* then paid "by way of deposit, and in part of 5,500*l.*," the whole purchase-money; possession to be delivered and accepted on a day named; B. agreed to accept the demise, but on the day fixed therefor refused; A. afterwards disposed of the house to a third person. This agreement contained a clause providing for a penalty of 1,000*l.* to be paid by either party making default. And being silent in respect to forfeiture of the deposit in case of the vendee's default, it was in this case held not forfeited because there was evidence in the agreement of a different intention. Lord Denman, C. J., said: "The ground on which we rest this opinion is that in the absence of any specific provision the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument; but as this imposes on either party that could make defense a penalty of 1,000*l.*, the intent of the parties is clear that there should be no other remedy. . . . The consequence appears to be that this vendor may sue for the penalty and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but in part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser."<sup>2</sup> If the agreed deposit has not been paid it cannot be recovered as such when the vendee has refused to perform — even if the intention is manifest that in that event the deposit shall be absolutely forfeited. One of the conditions of a sale<sup>3</sup> was that, should the purchaser neglect or fail to comply with any of the conditions,

<sup>1</sup> *Martin v. McCormick*, 4 Sandf. 366.

<sup>2</sup> *Ockenden v. Henly, El., B. & E.* 485.

<sup>3</sup> *Palmer v. Temple*, 9 A. & E. 508.



his deposit money should be actually forfeited to the vendor, who should then be at liberty to resell the property at public auction or private sale; and if the amount or price obtained on the second sale should not be sufficient to cover the amount bid at the present sale, with all the expenses incidental to it, the deficiency to be paid by the defaulter to the vendor. [230] The deposit was not paid, and on resale a less sum than the defendant's bid was realized. In an action on the contract Lord Campbell, C. J., said: "There having been an actual forfeiture of the deposit, by the express words of the seventh condition, the deposit, if paid, could not in any event be recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a resale. But the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well settled that by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment of part of the purchase-money, and not as a mere pledge.<sup>1</sup> Therefore, in this case, had the deposit been paid, the balance only of the purchase-money would have remained payable. What, then, according to the . . . condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited, so far as to prevent the purchaser from recovering it back, as without a forfeiture he might have done,<sup>2</sup> still it is to be brought by the seller into account if he seeks to recover as for a deficiency on a resale." Under a contract with a like condition in another case,<sup>3</sup> where the deposit had been paid, but there had been no resale, Lord Coleridge, C. J., said: "The deposit, therefore, is absolutely forfeited, and the vendor is at liberty, not bound, to resell; and may recover against the purchaser any deficiency on the second sale, together with the expenses of the abortive sale. The property not having been resold, in this case, the expenses to which the vendor has

<sup>1</sup> 1 Sug. on Vendors & P. 73 (4th Am. ed.).

<sup>2</sup> Palmer v. Temple, 9 A. & E. 508.

<sup>3</sup> Essex v. Daniel, L. R. 10 C. P. 538.

been put with reference to the abortive sale are recoverable from the purchaser, plus the deposit money. The case of *Ockenden v. Henly*<sup>1</sup> has been referred to; but the circumstances of that case, which are somewhat complicated, are wholly different from those of the present; the deposit [231] had never been paid, and the action was brought for the loss on the resale, and the expenses of the resale; these expenses formed part of the deficiency on the resale, occasioned by the default of the purchaser, and the loss on the second sale would be the deficiency of price and the expenses."

§ 586. **Conflict of American cases.** There is much conflict in the American decisions as to a purchaser's right in respect to payments made on a contract of purchase, after the vendor has put an end thereto for the vendee's default. One class of cases holds that, under such circumstances, the payments made are forfeited and lost; and another, that the putting an end to a contract by the vendor for such cause is a rescission, and entitles both parties to be put in *statu quo*. In a case of the former class the contract contained this clause: "And in case of failure on the part of said party of the second part to make either of the preceding payments when due, or in any respect to fulfill this contract, the same shall become void on such failure, if the party of the first part shall elect to rescind it, and on his previously giving notice of at least thirty days of such election; . . . and besides, the party of the second part shall, in case of such failure and consequent rescinding of the contract, forfeit \$100, as the ascertained and liquidated damages, and shall retain no legal or equitable interest in the premises after this contract is rescinded." There was afterwards default, rescission by notice, and surrender of possession. Welles, J., said: "The case in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate where the contract has been rescinded are, first, where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; second, where the vendor is incapable or unwilling to perform the contract on his part; or third, where the vendor has been guilty of fraud in making the contract. In either of those cases it would be against equity and conscience for the vendor to retain the

<sup>1</sup> EL. B. & E. 485.

money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his part, and the rescission is entirely in consequence of the un-[332] excused default of the vendee in making further payment, to allow him to recover back the money paid would in my opinion be little short of offering a bounty for the violation of contracts.”<sup>1</sup> But in a subsequent case in the same state, and in numerous cases in other states, it is held that where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, the contract is rescinded; and the vendee may recover payments made by him in an action for money had and received;<sup>2</sup> and the reasonable value of improvements made in good faith while he was in possession, less the value of the use of the premises.<sup>3</sup> If there is mutual default money paid “as a forfeit” by the purchaser remains in the vendor’s hands as if it were had and received for the use of the other, and may be recovered by him after the vendor has recouped the damage sustained by reason of the failure to purchase.<sup>4</sup>

On principle, if a contract is rescinded by the vendor, even for the vendee’s default, the former should restore what he has received upon it; and this view is believed to be sustained by the weight of authority.<sup>5</sup> Even if the contract shows that the parties intended that on default of the vendee all previous payments should be forfeited, and it be declared void at the vendor’s option, this intention should be disregarded for the same reasons that govern in other cases of penalties.

**§ 587. Adjustment of counter demands on rescission.** In Kentucky, where the vendee recovers against the vendor pur-

<sup>1</sup> *Battle v. Rochester City Bank*, 5 Barb. 414. See *Ashbrook v. Hite*, 9 Ohio St. 357.

<sup>2</sup> *Utter v. Stuart*, 30 Barb. 20; 2 Hill, 288; *Jacoby v. Stettler*, 2 Cent. Rep. 607 (Pa.); *Wotring v. Shoemaker*, 102 Pa. St. 496; *Hudson v. Reel*, 5 id. 279; *Lawrence v. Simons*, 4 Barb. 354; *Fancher v. Goodman*, 29 id. 315; *Ellenwood v. Futtis*, 63 id. 321; *Feay v. Decamp*, 15 S. & R. 227;

*Gilbreth v. Grewell*, 13 Ind. 484; *Burge v. Cedar Rapids, etc. R. Co.*, 32 Iowa, 101; *Franklin v. Miller*, 4 A. & E. 599; *Hunt v. Silk*, 5 East, 449; *Beed v. Blandford*, 2 Y. & J. 278; *McCarty v. Mooror*, 50 Tex. 287.

<sup>3</sup> *Sheard v. Welburn*, 67 Mich. 387.

<sup>4</sup> *Cleary v. Folger*, 84 Cal. 316.

<sup>5</sup> Cases cited in three last preceding notes.

chase-money and interest as damages for breach of a covenant to convey lands, there can be no deduction at law for rents and profits received by the covenantee. If the latter has had possession, taken the rents and profits, made improvements, or committed waste, these things are too complicated for a jury, and properly belong to chancery and must be settled there.<sup>1</sup> In that state, whether a judgment at law be given for either vendor or vendee, and whether the vendee is entitled to recover only consideration paid and interest, or enhanced damages by reason of the vendor's fraud or wilful default, it may be suspended by a suit in equity until [233] there has been an adjustment in the latter forum of rents and profits, compensation for improvements or waste; and the amount of the judgment will be subject to equitable deductions which result from that adjustment. The rule on these subjects appears to be the same in such cases as upon rescission of the contract in equity at the instance of either party.<sup>2</sup>

In Texas if a husband makes an executory contract for the

<sup>1</sup> *Combs v. Tarlton's Adm'r*, 2 Dana, 464 (1834).

<sup>2</sup> In *Wickliffe v. Clay*, 1 Dana, 585, it was decided that where one in possession of land, held *bona fide* as his own, has erected buildings thereon, he or those claiming under him may remove them without incurring any responsibility to the owner of the paramount title. If one buys land with buildings upon it, which he moves off, and then loses the land by a better title appearing, his vendors, upon a rescission of their contract, will be entitled to retain out of the consideration to be restored the value of the buildings so removed, assessed at their value when removed; not their estimated value at the time of the sale, but so much as they would have been worth—preserved with common care—as additions to the land at the time of the erection, and equivalent to what the occupant could have recovered for them of

the successful claimant. And where the removal was without the consent or privity of the party against whom the decree for restoration of the purchase-money is obtained, he may, because of the difficulty of the proof, elect to return the value of the buildings according to the above rule or as movable structures. The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other. But, as the evictor may recover for *mesne* profits for five years, the party evicted is entitled to interest for the same time on the consideration recovered from his vendor, and such vendee should pay interest on so much of the consideration as was unpaid while he held possession.

*Williams' Heirs v. Wilson*, 4 Dana, 507 (1836): Part of the consideration remaining unpaid, the purchaser was required to account for the same proportion of the total value of the



sale of a part of his homestead with one who had no knowledge of the character of the property and who, with the con-

rents that the unpaid part bore to the whole consideration.

*Richardson v. McKinson*, Litt. Sel. Cas. 320 (1821): Where a vendee of land has been let into possession, and the contract of sale has been rescinded on account of the misrepresentations of the vendor, and his inability to make a good title, the vendee cannot be compelled to pay rent beyond the profits actually received. In such a case, an inquiry how much the premises would have been reasonably worth annually to a man of ordinary industry and diligence is alike unnecessary and irrelevant. The vendee will be entitled to pay for the improvements made by him when the premises go out of his hands into the hands of the vendor.

*Caldwell's Heirs v. White*, 4 T. B. Mon. 561: Where the vendee rescinds the contract he must account for the rents from the date of his purchase.

*Gaines v. Bryant*, 4 Dana, 395: Where the possession is wrongfully withheld from a vendee he is not obliged to pay interest on purchase-money due.

*Barnett v. Higgins*, 4 Dana, 565 (1836): A purchaser who had received the possession, but failing to get a title had recovered judgment against his vendor for the purchase-money and interest, is accountable in equity to the vendor for the rents and for waste, and is entitled to pay for improvements. And if he is allowed in the adjustment for improvements made by him in clearing land, etc., at their value when first made, he should be charged with the rent of them as well as for those which were on the land when he entered. In adjusting an account of rents, improve-

ments, etc., for a decree, the rents were computed up to a certain time, and decree rendered for the balance; the cause was then appealed, reversed and remanded, with directions to ascertain by a commissioner the value of the use, not before included, of certain improvements, and also the amount of rents, of waste, etc., accrued after the period to which the accounts were brought down in the former adjustment, and up to the time when the purchaser would relinquish the possession, and for a decree for the balance so ascertained.

*Stephenson v. Harrison*, 3 Litt. 171 (1823): Where a man covenants to convey land to which he knows he has no title, and to deliver possession on a particular day, the value of the land on the day the possession was to have been delivered, with interest, is the measure of damages. Judgment at law had been recovered for the purchase-money, and a bill in equity was filed for compensation for failure of title to part of the land. The court say: "Here it is apparent that Harrison not only had no title to the tract, . . . but that, prior to his sale to the complainant, he must have had a perfect knowledge of Hays' right; and, although the sale was for three thousand one hundred acres, including the tract of Hays, it is in proof that the four hundred acres of Hays formed such an essential inducement to the purchase, that without the separate and specific covenant of Harrison for that part the complainants would not have completed the purchase. Besides, the proof is satisfactory that the tract of Hays is in value greater than an average four hundred acres, and was so considered by the complainant when

sent of the covenantor and his wife, makes valuable improvements thereon, there may be a recovery for their value.<sup>1</sup> The

making the purchase, and, after selling the land, Harrison, for an adequate sum, might have obtained from Hays his four hundred-acre tract. The failure of Harrison to comply with his covenant thus made, and which might have been thus fulfilled, instead of being the result of an honest inability to perform his undertaking, must be ascribed to a wilful and fraudulent intention not to comply with his stipulations in relation to the tract of Hays, and ought to subject him to the complainant's demand for compensation in a sum equal to the value of the tract of Hays together with the accruing interest thereon. The value should be ascertained by the inquest of a jury, who, in their inquiry, ought to be confined to the 1st of October, 1817, the time when by the covenant of Harrison the possession of Hays' tract was to be delivered to the complainants."

In *Combs v. Tarlton's Adm'r*, 2 Dana, 464 (1834), Judge Underwood said: "Where the profits of the land in the possession of the vendee are of more value than the interest of the money enjoyed by the vendor, it is utterly unjust to allow the vendee to recover the purchase-money with its interest, and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim, and becomes responsible to the evictor for the *mesne* profits, then he ought to recover interest from his vendor for as many years as he is or may be required to account to the evictor for the profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits

greatly exceed the interest of the purchase-money, manifest injustice would result from permitting the vendee to recover interest, and likewise to keep the profits. The principle upon which all contracts ought to be rescinded is that the parties should be placed in *statu quo*. If the contract between the vendor and the vendee is set aside by the chancellor he would never give interest to the vendee and allow him also to keep the profits. On the contrary, he would say to the vendee: 'As you have enjoyed all you contracted for, and as the profits of the land are as valuable, or more so, than the interest on the purchase-money, you shall not have both; but if you require a restoration of the purchase-money and interest, you must restore, on your part, the land and its profits; but as by the contract you and the vendor regarded the land and purchase-money equivalent to each other, I (the chancellor) will regard the use of each as of the same value, and take no account between you for interest or profit.' This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase-money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit, and cannot be made to yield any without the expenditure of money, or labor, or both, then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase-money with its interest should be restored by the vendor. In such a case the

<sup>1</sup> *Eberling v. Deutscher Verein*, 72 Texas, 339.

right thereto does not depend upon the statutes regulating the action of trespass to try title, but on the principles of

vendee generally regards the prospect of a rise or appreciation in the price of land as the equivalent or consideration which he receives for the interest on the purchase-money; and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and, receiving no esplees or profits, the land not being in condition to yield any, justice would require the restoration of the purchase-money with interest upon a rescission of the contract. The cases first decided by this court were, in all probability, of this description.

“Whether the rules which would govern in chancery can be applied with safety to a trial at law has been a subject of much consideration with the court. The rules of right ought to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession to allow them to be considered and settled by a jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land; for waste and damage; and against these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the chancellor is more competent to administer justice than the common-law judge aided by the hasty inquiry of a jury. We shall there-

fore leave the rule at law to stand as we found it, and as recognized by the case of *Cox's Heirs v. Strode*, 2 Bibb, 273. The vendee is entitled to his judgment at law for the amount of purchase-money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and improvements, and for such decree as equity requires.”

*Cornish v. Stratton*, 8 B. Mon. 586: C. sold S. three tracts of land, on one of which was a grist-mill and a saw-mill. The purchase-money having been paid, the vendee brought an action of covenant against the vendor, alleging a failure to convey. C. filed a bill for specific performance, and to restrain the action at law. This bill was dismissed, but without prejudice to any claim the vendor might have for rent or waste. The vendee proceeded with his action and obtained judgment for the consideration and interest, \$3,000. After the recovery of this judgment the vendor filed a bill setting forth the foregoing facts, alleging waste by negligent burning of the mills and otherwise; that the rental value of the mill was \$500 per annum; also that the vendee was unable to pay the rent and damages for waste, unless by set-off of his judgment; there was a prayer for injunction against that judgment which was awarded him, and a rescission of the contract. The destruction of the mills was found to have resulted from a want of reasonable care and attention on the part of the vendee. He was held responsible for the loss, and the amount deducted from the judgment; as to the residue, the injunc-

equity.<sup>1</sup> If the rescission is on account of a defect in the title the purchaser may recover purchase-money and interest and for permanent improvements, less the value of the rents while he had possession or control.<sup>2</sup>

In Tennessee the vendee, when he procures rescission on the ground that the vendor cannot make title, may recover [247] interest on purchase-money recovered, from the time when it was paid, as well as for valuable improvements.<sup>3</sup> He will not be allowed for improvements, taxes and other beneficial expenditures, except as a set-off against rents and profits, where only nominal damages for loss of the bargain would be given at law unless there is fraud in the sale;<sup>4</sup> and he will be

tion was dissolved. The vendee in his action at law recovered a judgment for \$149 more than the *ad damnum* in his declaration, and he remitted it. But in the final adjustment the vendor was required to pay it to do equity.

*Williams' Heirs v. Wilson*, 4 Dana, 507 (1836): The general rule, according to former decisions (*Cogswell's Heirs v. Lyon*, 3 J. J. Marsh. 41; *Morton's Heirs v. Ridgway*, 3 J. J. Marsh. 254; *Taylor v. Porter*, 1 Dana, 421), is, that where a contract for the sale of improved land of which the purchaser has had possession is rescinded, the use of the land and interest on the purchase-money shall be deemed equivalents, constituting set-offs one against the other. But there are many cases where this rule would not be equitable, and would not, therefore, be applied, e. g., where the sale was of wild land — where much of the tract was unimproved, and especially where the purchase was not made with a view of deriving profit from the use of the land. In such cases the interest would be decreed to the purchaser with the purchase-money, deducting the value — if anything — of the use of the land, provided money was paid; and he was not

chargeable with improper delay in urging the consummation of the legal title, or a rescission of the contract. There has never been any universal rule for adjusting and setting off rents against interest upon rescission of a sale of lands. As cases vary, the equity of allowing rents and interest must vary — the object in every case being to place the parties as near as possible in *statu quo*.

<sup>1</sup> *Patrick v. Roach*, 21 Texas, 256.

<sup>2</sup> *Mason v. Lawing*, 10 Lea (Tenn.), 264.

<sup>3</sup> *Winters v. Elliott*, 1 Lea, 676; *Mason v. Lawing*, 10 id. 264.

<sup>4</sup> *Conger v. Weaver*, 20 N. Y. 140; *Peters v. McKean*, 4 Denio, 550; *Coffman v. Huck*, 19 Mo. 435; *Gilbert v. Peteler*, 38 N. Y. 170; *Hoover v. Calhoun*, 16 Gratt. 109; *Bright v. Boyd*, 1 Story, 478; *McMalkin v. Bates*, 46 How. Pr. 405; *Lemmon v. Brown*, 4 Bibb, 308; *Jones' Heirs v. Perry*, 10 Yerg. 59; *McKinley v. Holiday*, id. 477; *Wilhelm v. Fimple*, 31 Iowa, 131; *Gillet v. Maynard*, 5 Johns. 85; *Morris v. Terrell*, 2 Rand. 6; *Putnam v. Ritchie*, 6 Paige, 390.

Where the owner of leasehold premises under a lease in fee died, leaving several infant children, and their mother, who was the administratrix of his estate, assigned the



[248] chargeable for any waste and deteriorations which occur by his acts or negligence.<sup>1</sup> But when the circumstances are such that the vendee would be entitled to recover for loss of the bargain at law he is entitled, on rescission in equity, or

lease to the owner of the rent as heir of the lessor, in consideration of his discharging his claim for the rent against the estate of the decedent: Held, that the assignment was void, and that the children of the decedent were not divested of their legal estate in the premises; and that the assignee of the lease having, under a misapprehension of his legal rights in the premises, made large and valuable improvements thereon, the owners of the legal estate were not bound to pay him for these improvements. The chancellor: "The arrangement for giving up the lease being wholly unauthorized, the defendants (claiming under that lease) are therefore entitled to the benefit of the natural increase in the value of the property since that time. I am not aware that the law of any civilized country has directly deprived the legal owner of property of the natural accession to the same; although the supreme court of the United States, in the case of *Green v. Biddle* (8 Wheat. 1), appear to have supposed that the occupying claimants' law of Kentucky was calculated to produce that effect indirectly. But the rule of natural equity appears to be different in regard to industrial accessions or permanent improvements made upon the property of another by a *bona fide* purchaser. By the rules of the civil law, the possessor of the property of another, who had erected buildings or made other improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for

such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it. Puff., B. 4, ch. 6, § 6; Code Napol., art. 555; 3 Parida., tit. 28; Bell's Law of Scotland, 130, art. 538; Rutherford, Inst. 71; Inst. of Law of Spain, 102. This principle of natural equity has been adopted by the law of England and in this state to a limited extent, in the action for *mesne profits*, where the *bona fide* possessor of property is permitted to offset or recoup in damages the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy. Here the use of the lot, subject to the widow's right of dower, which the complainant is equitably entitled to under her assignment of the lease, although it could not be sold so as to pass the legal title before it was set off to her, is probably equal to two-thirds of the rent reserved upon the lease. And if I felt myself authorized to introduce this principle of natural equity into the law of this court farther than it has been adopted here, I should direct a reference to a master to ascertain the present value of the lot, exclusive of the buildings, subject to the widow's dower and to the future rents, exclusive of her share thereof, and also to ascertain the present value of the buildings, subject to the right of dower therein; and should give the defendants the right to elect, upon the coming in of the master's report, whether they would retain the legal title to the

<sup>1</sup> *Cornish v. Stratton*, 8 B. Mon. 586; *Foster v. Gressett's Heirs*, 29 Ala. 393.

where damages are given in lieu of specific performance, not only to recover the purchase-money and interest, but to be fully compensated for improvements and beneficial expenditures, with proper deductions for the rents and profits which he has enjoyed.<sup>1</sup>

§ 588. **Adjustment of counter equities in specific [234] performance.** The manner of accomplishing such adjustments is not everywhere the same; but there is uniformly recognized the elements which may be involved. The general princi- [235] ple is that he who withholds possession after it is his duty to deliver or surrender it shall make compensation to the party to whom such delivery or surrender was due for benefits [236] received from such possession, while withheld, or the value of the use, and for waste or deterioration resulting from his acts or neglect. After the purchaser is entitled to posses- [237] sion, if the vendor retain it or prevent its delivery, the vendee is entitled to compensation for the loss. He will be allowed the value of the rents and profits, and where these are

lot, subject to the rent and right of dower, and pay to the complainant the value of such improvements, or would release to him their legal estate in the premises upon being paid the value thereof as thus ascertained exclusive of the buildings. This principle of natural equity is constantly acted upon in this court, where the legal title is in the person who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court, in such cases, acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land the legal title to which was in the defendant, where there was neither

fraud nor acquiescence on the part of the latter after he had a knowledge of his legal rights." See *Bright v. Boyd*, 1 Story, 478; *Herring v. Pollard*, 4 Humph. 362; *Green v. Biddle*, 8 Wheat. 79.

<sup>1</sup>*Peabody v. Tarbell*, 2 Cush. 226; *Case v. Wolcott*, 33 Ind. 5; *Carroll v. Rice*, Walk. Ch. 373; *Putnam v. Ritchie*, 6 Paige, 390; *McConnell's Heirs v. Dunlap's Devises*, Hardin, 41; *Fisher's Heirs v. Kay*, 2 Bibb, 434; *Gerauld v. Anderson*, id. 543; *Patrick v. Marshall*, id. 40; *Thompson v. Bell*, 37 Ala. 438. In the last case there was misrepresentation of quantity in a particular parcel included in the purchase; and it was held that the proper mode of computing damages is to multiply the average value (not of the entire tract but) of the particular parcel per acre by the difference between the number of acres which it actually contained and the number which it was represented to contain.

less than the interest on the purchase-money the latter will be allowed instead.<sup>1</sup> From the date of the contract everything that forms part of the inheritance belongs in equity to the purchaser; and if severed and converted by the vendor he is bound to make compensation either on the basis of the value of the severed property or the diminished value of the land, according to the circumstances.<sup>2</sup> There is an interesting discussion of this liability in a New York case.<sup>3</sup> P. contracted to convey certain lands to the plaintiff, but conveyed them instead to the defendant, M., who had knowledge of the prior agreement. The plaintiff in 1844 filed his bill in chancery to compel a specific performance of the agreement, and obtained a decree. This decree directed a reference to a master to as-  
[238] certain the amount of damages sustained by the plaintiff by reason of having been kept out of possession, and by reason of waste committed by defendant M. The purchase-money was paid by the plaintiff, according to the decree, and P. executed and tendered a conveyance of the premises, but defendant M. continued in possession pending sundry appeals until 1859. These appeals related to the question of damages as found and assessed, first by the master and subsequently by a referee appointed by the court. It was also a part of the case, and it appeared in evidence, that the lands were of little value for agricultural purposes, and were purchased by the plaintiff for the manufacture of brick. It was held: 1. That the general rule which allows to the vendor the interest on the purchase-money, and to the purchaser the rents and profits, failing here to apply as an equitable remedy because of the peculiar circumstances of the case, the equitable indemnification of the plaintiff for being kept out of possession is found in allowing him as damages an annual sum equal to the interest on the purchase-money paid by him. 2. He should be allowed the

<sup>1</sup> Kentucky cases cited in preceding section; *Esdaile v. Stephenson*, 1 Sim. & S. 122; *Jones v. Mudd*, 4 Russ. 118; *Burton v. Todd*, 1 Swanst. 255.

<sup>2</sup> *Caldwell's Heirs v. White*, 4 T. B. Mon. 561; *Robertson v. Skelton*, 12 Beav. 260; *Dyer v. Hargrave*, 10 Ves. 506; *Barnett v. Higgins*, 4 Dana, 565; *Combs v. Tarlton's Adm'r*, 2 id. 464;

*Cornish v. Stratton*, 8 B. Mon. 586; *Shawhan v. Long*, 26 Iowa, 488; *Gaines v. Bryant*, 4 Dana, 395; *Hepburn v. Dunlap*, 1 Wheat. 179; S. C., 3 id. 231; *Bolling v. Lersner*, 26 Gratt. 36. See *Burgett v. Bissell*, 14 Barb. 638.

<sup>3</sup> *Worrall v. Munn*, 38 N. Y. 137.



damages sustained by the deterioration from waste committed by the defendant. 3. These should be continued down to the time when the plaintiff was let into possession. 4. Upon the damages caused by being kept out of possession, interest should be computed on each actual amount from the end of each year down to the time of the assessment or report; and upon the damages caused by waste only from the time when the plaintiff was let into possession to the time of the assessment or report.<sup>1</sup> Following the principles enunciated in this

<sup>1</sup> Woodruff, J., said: "The present case is peculiar in two respects, viz: first, the purchase-money, with the interest thereon, was payable, and was properly decreed to be paid, to the defendant Pratt, the original owner and vendor of the premises, who acquiesced in the decree and executed a deed in obedience to its requirements, while the possession was held by the defendant Munn; and second, the principal value of the lands consisted in the deposits of clay, adapted by the consumption thereof to the manufacture of brick on the premises. The inapplicability of the general rule above stated to land of this description may be rendered quite apparent by an illustration closely analogous to the present. For example, suppose a sale of land, of no value for ordinary use because incapable of cultivation and entirely unsuited to pasture, and yet by reason of a bed of valuable ore of very large value, and for that sole reason, sold at a large price. On a decree [239] for specific performance, shall the purchaser be charged with interest on the purchase-money for the period during which he is kept out of possession, and the vendor pay nothing (because the rents and profits are nothing) for depriving the purchaser of the opportunity of working the mine or ore bed during the period of delay? Or, if the purchase-money

has been paid, shall the vendor, who has enjoyed the use of the purchase-money, have the advantage of his own wrong, and make no compensation to the purchaser for his loss of opportunity? The answer must be, not so; unless the rules of equity are so imperfect that such injustice cannot be prevented. Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is in substance this: Was the referee right, on the first reference in the present case, in inquiring how much the plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which in fact now remains to him to be worked presumptively with equal benefit, and thereupon allowing the plaintiff interest on such possible receipts from year to year as damages for the delay? This mode of estimating his damages proceeded upon the ground, not that the plaintiff lost the clay beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money so soon as perhaps he might have done if he had obtained the possession when he was entitled thereto. I find no warrant for any such speculative rule or measure of damages; no case is cited to us, and I think it may be safely



case it has been ruled by the New York court of common pleas that upon a judgment in favor of the plaintiff in an action for specific performance of a contract to sell land which he purchased for the purpose of improving, and from which

averred that no case can be found, in which such a rule was adopted. No analogy can be found in any rule of assessment of damages at law. The rule, then, is the value of the use, not the profits of the consumption of the property detained, when in fact the entire property is restored to the plaintiff's possession. . . . The plaintiff offered to prove that he purchased for the express purpose of devoting it to the making of brick, and to converting its contents into money. Now suppose the plaintiff, although he had contracted to pay therefor a large sum, had in fact paid no part of the purchase-money, and he was now to be put in possession and permitted to carry into effect the purpose for which he bought the property. He would be completely indemnified against loss by relieving him from the payment of interest. True, he would fail to realize, at so early a day as he anticipated, the profits of his bargain, but he has now that chance of profits, and meantime he has had the use of the purchase-money. In short, the general rule which allows to the vendor the interest, and the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it. Relief from the payment of interest is, in such a case, palpably the most obvious, as it is the most equitable, mode of doing so. For, otherwise, the vendor is permitted to profit by his own wrong, and the

purchaser compelled to submit to a certain loss. . . . But it is one of the peculiarities of this case [240] that the purchase-money and interest was due to the defendant Pratt, and has been paid while the defendant Munn has been in possession, and during the period of litigation down to 1859, at least, has kept the plaintiff out of possession. The plaintiff has lost the interest on the purchase-money, and the nature of the property is such that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity. Within the principles of the cases referred to, and, as I think, in most just conformity to reason and equity, the defendant should be charged with the amount of that interest as damages down to the time when the plaintiff was let into possession."

The question whether the damages for waste committed by a vendor pending a contract of purchase should be measured by the injury to the inheritance occasioned thereby, or by the value of the materials taken from the premises, or where timber has been cut, or stone has been quarried, or earth removed by him; or whether either method may be adopted in the ascertaining the damages, was not particularly considered in the opinion from which the foregoing quotation has been made. The judgment directed that in ascertaining the damage sustained by reason of waste committed by the defendant, the court should allow to the plaintiff the "actual value of the clay and sand taken from the premises by the defendant, and of any timber or trees

no rents or profits were derivable so long as it remained unimproved, that inasmuch as the damage sustained by being kept out of possession was not capable of legal ascertainment, the plaintiff should not be charged with interest upon the un-

cut thereon and removed by him, with interest on such value from the time the plaintiff was let into possession until the time of the assessment. The damages were subsequently assessed in accordance with the judgment, and judgment was given for the same. This judgment having been affirmed at general term, the defendant again brought the case, by appeal, before the court of appeals. The defendant asked reversal on the ground that the rental value of the premises for ordinary purposes of husbandry is the only criterion of damages for keeping the plaintiff out of possession; and that the diminished value of the land, and not the value of the materials taken therefrom, should be adopted as the measure of compensation to which the plaintiff was entitled for the injury in the nature of waste committed. It was held that the assessment was in strict conformity to the directions given on the former appeal, and that the judgment should be affirmed on the principle of *stare decisis*, unless there was a plain error committed by the court in giving those directions. The principles laid down in the former opinion were reaffirmed in respect to the right to assess damages down to the time of assessment and to the adoption of interest on the purchase-money paid as a measure of damages for the plaintiff being kept out of possession. On the other question, Andrews, J., said (53 N. Y. 185, 189): "It is not denied that the defendant is liable to the same extent as the vendor would have been. He entered under a contract with him, and with notice of the plaintiff's rights; and

the waste was committed *pendente lite*. It is clear, I think, that the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given, in view of the nature of the plaintiff's interest and the character of the injury. A mortgagee or lienor could only recover on proof that his security was rendered inadequate by the injury to the freehold. If the soil, having no value separate from the land, was stripped from it, so as to render it unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. (Foster v. Deacon, 3 Madd. 394; 3 Sugd. on V. & P. 133 [2 id. (4th Am. ed.) 336].) But the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by a wrong-doer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or making a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal severed from the

paid purchase-money, and the defendant should be charged with all interest and taxes accruing prior to the delivery of his deed, without being allowed anything for the increase in the value of the land.<sup>1</sup>

[241] If the vendor retains possession as security for the purchase-money pending a question incidental to specific performance, where that relief as to the principal part of the land is not disputed, but mutually contemplated, he will be charged in respect of it like a mortgagee in possession. In an English case<sup>2</sup> a dispute arose between trustees for a de-[242] ceased vendor and a purchaser; the latter claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding such piece. They had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, and in the meantime it was allowed to lie waste. It was held that the purchaser should be allowed to set off against the interest payable by him the amount which might have been received, and the amount of deterioration. The lord chancellor said: "By the effect of

soil, might be considerable. The wrong-doer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before. (*Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Bennett v. Thompson*, 13 Ired. L. 146.) The liability of the vendor who, pending a contract of purchase, commits waste upon the premises by cutting timber, trees, or removing stone, sand or clay therefrom, to pay or account to the purchaser for the value thereof, results, I think, from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. The purchaser is deemed in equity to be the owner of the land, and a court of

equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties upon this assumption. I am satisfied that the judgment declaring the defendant liable for the value of the sand, clay and timber taken by him from the premises was not inadvertently pronounced, but is supported by reason and authority; and I shall content myself by citing some authorities bearing on the subject, without further discussion: *Nelson v. Bridges*, 2 Beav. 239; *Attersol v. Stevens*, 1 Taunt. 183; *De Visme v. De Visme*, 1 Macn. & G. 336; *Dart on V.* 116; 3 Sugd. on Vend. 134 [2 id. (4th Am. ed.) 336]; *Paine v. Miller*, 6 Ves. 349; *Moores v. Wait*, 3 Wend. 104."

<sup>1</sup> *Selleck v. Tallman*, 11 Daly, 141.

<sup>2</sup> *Phillips v. Silvester*, L. R. 8 Ch. 173.

the contract, assuming there to be no ground on either side for simply setting it aside according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended; then, is not such a person so entering into possession answerable, when the account under the security comes to be taken, for not keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security, the contract being one which, in the view of a court of equity, has changed the title of the land,—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a farther security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditures, for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase-money is made [243] and the conveyance is accepted. He has that right; but the question is upon what terms that right is to be exercised. It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any



[244] other person.<sup>1</sup> . . . My opinion is that, in that state of things, there being proof of careless, and, I must say, of wantonly negligent conduct on the part of the plaintiff, which has caused serious dilapidations, I cannot differ from the master of

<sup>1</sup> The further remarks of the lord chancellor are important. He said: "The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim, if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to show, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or suggest that the purchaser was not a person who could be made responsible for anything that might be due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right, and were doing nothing wrong in insisting as they did, upon retaining possession until the purchase-money was paid; yet, on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and

responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say: 'The time has come when you might have taken, and ought to have taken, possession, and therefore you must bear the consequences of all the subsequent deterioration;' and in another breath say: 'We have a right to refuse you possession, and we choose to exercise that right.' Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this: that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the plaintiff had sent to Mr. Silvester and had said: 'We are perfectly willing to let you go into possession subject to the question between us,' and Mr. Silvester had said in reply: 'I am willing to take possession, but I am not willing to pay the purchase-money;' or if he had said: 'I will not take possession unless you give a conveyance and the whole thing is closed up,' Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one, which, in the exercise of

the rolls, or see any reason to alter his lordship's order in this respect." The order of the master was that the plaintiffs have the balance of the purchase-money with interest; that an account be taken of the rents and profits received by them in respect of the premises, or which, but for their wilful neglect and default, might have been received; and an inquiry as to any deterioration in the premises from the date from which the interest on the purchase-money was to be computed, and as to what would be required to restore them; and it was declared that the defendant would be entitled to set off [245] against the interest the amount so found.<sup>1</sup> If as a consequence

his strict rights, he would have himself created. But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on, it is not true that giving possession to the vendee would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase-money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into court. Here there was a very small question between the parties as to this land occupied by the railway — a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel them to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession, pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated

that on the payment of a small sum of money, £250, he might and would have been let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties."

<sup>1</sup> The case last stated has been followed in *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. Div. 390; *Earl of Egmont v. Smith*, 6 id. 469. It has been regarded by Mr. Dart as a departure from the rule which formerly prevailed in England. He says in the last edition of his work on *Vendors & Purchasers* (vol. 2, p. 650, 5th Eng. ed.): "This decision was strongly disapproved of by Sir George Jessel, M. R., when the cause came on before him for further consideration. As his honor remarked, the reasoning upon which it is based is wholly inconsistent with the law as laid down by the court in *Sherwin v. Shakespear* [5 De G., M. & G. 517, 536; S. C., 17 Beav. 267]; and followed in subsequent cases. A vendor who retains

of withholding possession the purchaser loses a tenant who has entered into a lease of the premises the vendor is liable for the rent lost.<sup>1</sup>

§ 589. **Same subject.** Where there is a rescission of a land contract the parties are to be put in *statu quo* as nearly as possible. There cannot be a literal restoration where the contract has been acted upon, payments made, or possession enjoyed; then rescission requires compensation for what has been mutually enjoyed under the contract, as well as for deteriorations.<sup>2</sup> If the contract be rescinded in equity, even on the ground of fraud in the purchase, the court will in general direct an allowance to be made to the purchaser for beneficial expenditures, substantial improvements and repairs.<sup>3</sup> This allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs — except such as are essential to the preservation of the property — where they are made subsequently to the discovery of the matter on which he grounds his right to relief.<sup>4</sup> Such expenditures as are made before discovery of the defect in the title will be allowed, upon proper pleading, to

possession of the estate until completion of the purchase does so, not in the character of a mortgagee for better protecting his lien for unpaid purchase-money, but in the character of trustee (using the term in a qualified sense, and not as implying the obligations of an ordinary trusteeship) for the purchaser; and, as in the case of a trustee, so *a fortiori* in the case of a vendor so circumstanced, it is only under special circumstances that he ought to be charged with wilful default as respects the due preservation of the property; especially where, as in the case just referred to [Phillips v. Silvester], the non-completion of the purchase by the appointed time is occasioned by the purchaser's own default. If the rule were otherwise a vendor might find himself compelled to make a heavy outlay for repairs or the like (as on the sale of

a mill and machinery), which might be objected to by the purchaser as unnecessary or improper; and, unlike a mortgagee or trustee, he would have no means except by a suit or possibly by a summons of recovering from the purchaser the amount which he has so expended." This view coincides with that of the court in *Royal Bristol Society v. Bomash, supra*, though the rule of *Phillips v. Silvester*, being authoritative, was followed.

<sup>1</sup> *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. Div. 390.

<sup>2</sup> *Foster v. Gressett's Heirs*, 29 Ala. 393; *Smith v. Stewart*, 83 N. C. 406; *West v. Waddill*, 33 Ark. 575.

<sup>3</sup> *Dart on V. & P.* 222; *McClure v. Lewis*, 72 Mo. 314. See *Jackson v. Ludeling*, 99 U. S. 513.

<sup>4</sup> *Id.*

the vendee;<sup>1</sup> but subject to the counter-claim of rents and profits received, or which, without his wilful default, might have been received; and this is especially so where the improvements or expenditures have been made in pursuance of the contract.<sup>2</sup>

Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands without repaying these expenditures. If a vendor is unable to make a good title to a portion of the premises, the vendees are entitled to elect whether they will rescind the contract *in toto*, and receive back their expenditures under it, or will accept such conveyance of the whole property as the vendor can give, paying him the price stipulated, less such deduction [246] as may be just for the defect. If, in such a case, the vendees elect to rescind the agreement *in toto*, they are entitled to be repaid the amount which they have expended in compliance with its terms in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession or the recovery thereof by the legal owners.<sup>3</sup> But if the vendees elect to receive such title as the vendors can give, with compensation for the defect, they have a right to ask for a judgment to that effect. The vendor cannot recover possession until the vendees have had an opportunity to make their election, and have it complied with either by the repayment to them of the expenditures, or by the payment of the sum which shall be fixed as the proper purchase-money, and a tender of a conveyance of the vendor's title. Purchasers will not be compelled to take part only of what they have agreed to buy as an entirety. The compensation for the deficiency, in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value of the whole prop-

<sup>1</sup> Dart on Vend. & P. 380; Patrick 38 N. Y. 165; Sheard v. Welburn, 67 v. Roach, 21 Tex. 251. Mich. 387.

<sup>2</sup> Davis v. Strobbridge, 44 Mich. 157;

Gibert v. Peteler, 38 Barb. 488; S. C.,

<sup>3</sup> Gibert v. Peteler, 38 N. Y. 195.



erty in consequence of defects or incumbrances, and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all with a conveyance of the residue only.<sup>1</sup> If the vendee has had possession under the contract, and afterwards procures a rescission on the ground of the vendor's failure to convey, he is entitled to have the purchase-money refunded, to interest upon it during the time that he is liable to another party as owner of the paramount title for rents and profits;<sup>2</sup> but not while in receipt of the rents and profits, in the absence of such liability, unless they are of less value than the interest.<sup>3</sup> And where payment is made in depreciated currency, or in property, the refunding on rescission is to be according to its value.<sup>4</sup>

[249] § 590. **Damages in suits for specific performance.**

In suits for specific performance equity may retain the case to give compensation in lieu of specific performance, or that may be decreed in part and compensation allowed for the residue.<sup>5</sup> Where the entire relief which can be afforded in a suit of that character is compensation, courts of equity have sometimes granted it;<sup>6</sup> and the measure is the same as that given at law.<sup>7</sup> If there is a defect or an excess of quantity there will be an abatement or increase of the purchase-money

<sup>1</sup> *Id.* See *King v. Thompson*, 9 Pet. 204.

<sup>2</sup> *Talbot v. Sebree's Heirs*, 1 Dana, 56; *Oakes v. Buckley*, 49 Wis. 592.

<sup>3</sup> See cases cited in note 4, *ante*, p. 1299.

<sup>4</sup> *Bodley v. McChord*, 4 J. J. Marsh. 477.

<sup>5</sup> *Union Coal M. Co. v. McAdam*, 38 Iowa, 663; *Leach v. Forney*, 21 *id.* 271; *Presser v. Hildenbrand*, 23 *id.* 483; *Hazelrig v. Hutson*, 48 Ind. 481; *Case v. Wolcott*, 33 *id.* 5. Compare *Sternberger v. McGovern*, 15 Abb. (N. S.) 257. See *Reynolds v. Johnson*, 13 Tex. 214; *Longworth v. Mitchell*, 26 Ohio St. 334.

<sup>6</sup> *Combs v. Scott*, 76 Wis. 662; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 *id.* 130; *Pratt v. Law*, 9 Cranch, 494; *Payne v. Graves*,

5 Leigh, 561; *Morss v. Elmendorf*, 11 Paige, 277; *Ferrier v. Buzick*, 2 Iowa, 136; *Sternberger v. McGovern*, 15 Abb. (N. S.) 257; *Johnston v. Glancy*, 4 Blackf. 94; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Aday v. Echols*, 18 Ala. 353; 2 Story's Eq., § 798; *Carroll v. Rice*, Walk. Ch. 373; *Berryman v. Hewitt*, 6 J. J. Marsh. 462.

<sup>7</sup> *Peabody v. Tarbell*, 2 Cush. 226; *Carroll v. Rice*, Walk. Ch. 373; *Dustin v. Newcomer*, 8 Ohio, 49; *Taylor v. Smith*, 2 Whart. 432; *Lee v. Dean*, 3 *id.* 316; *Coe v. Lindley*, 32 Iowa, 437; *Smith v. Sillyman*, 3 Whart. 589; *Gerault v. Anderson*, 2 Bibb, 543; *Patrick v. Marshall*, *id.* 40; *McConnell v. Dunlap*, *Hardin*, 14; *Fisher v. Kay*, 2 Bibb, 434.

according to the average price per acre of the whole tract;<sup>1</sup> and this defense of deficiency is generally good at law by way of recoupment;<sup>2</sup> but for loss of a distinct parcel there will be an abatement of the purchase price of that parcel, or of its actual value, according to the circumstances; that [250] is, whether as to that parcel the damages for loss of the bargain should be substantial or only nominal.<sup>3</sup> Where a tract of land is sold for a sum *in gross*, and not by the acre, and the quantity stated is qualified by the words "more or less," there is no warranty of quantity, and there can be no abatement if the number of acres is less than that stated, nor compensation allowed for any excess.<sup>4</sup> The force of the qualifying word "about" is comparatively slight; while it does not bind the parties to the precise number of acres, it imports that the actual quantity is a near approximation to that stated, "that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."<sup>5</sup>

The English chancery amendment act of 1858,<sup>6</sup> commonly called Lord Cairn's Act, provides that in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract

<sup>1</sup> Wright v. Young, 6 Wis. 127.

<sup>2</sup> Walsh v. Hale, 25 Gratt. 314; Nelson v. Carrington, 4 Munf. 332; Gray v. Handkinson, 1 Bay, 278; State v. Gaillard, 2 id. 11; Sumter v. Welsh, id. 558; Adams v. Wylie, 1 N. & McC. 78; Hoback v. Kilgore, 26 Gratt. 442; Quesnel v. Woodlief, 6 Call, 218; Hundley v. Lyons, 5 Munf. 342; Harrell v. Hill, 19 Ark. 102; Funk v. McKeoun, 4 J. J. Marsh. 169; Hampton v. Eubank, id. 634; Burk's Appeal, 75 Pa. St. 141; Harder v. Woodward, id. 479; Kent v. Carcaud, 17 Md. 291; Stow v. Bozeman, 29 Ala. 401; Rowland v. Shelton, 25 id. 220; Worthly v. Patterson, 20 id. 172; Whiteside v. Jennings, 19 id. 784; Marshall v. Wood, 16 id. 812; Willis v. Dudley, 10 id. 938; Joliffe v. Hite, 1 Call, 262; Hall v. Cunningham, 1 Munf. 310;

Hall v. Mayhew, 15 Md. 551. See Courcier v. Graham, 2 Ohio, 341.

<sup>3</sup> Thompson v. Bell, 37 Ala. 438; Gibson v. Marquis, 29 id. 668; Walsh v. Hale, 25 Gratt. 314.

<sup>4</sup> Hall v. Mayhew, 15 Md. 551; Commissioners v. Thompson, 4 McCord, 241; Tucker v. Cocke, 2 Rand. 51; Chipman v. Briggs, 5 Cal. 76; Voorhees v. De Meyer, 2 Barb. 37; Harrell v. Hill, 19 Ark. 102; Ketchum v. Stout, 20 Ohio, 453; Tyson v. Hardesty, 29 Md. 305; Seamonds v. McGinnis, 3 Gratt. 319; Faure v. Martin, 7 N. Y. 210; Mack v. Patchin, 29 How. Pr. 20; Jones v. Tatum, 19 Gratt. 735; Reed v. Patterson, 7 W. Va. 263. Compare Triplett v. Allen, 26 Gratt. 724.

<sup>5</sup> Baltimore Permanent Building & L. Society v. Smith, 54 Md. 187, 204.

<sup>6</sup> 21 and 22 Vict., ch. 27, sec. 2.

or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance. It has been held that under this statute the court would not interfere to award damages where it would not have interfered to grant relief before.<sup>1</sup> It will not grant relief where the bill is filed for damages only;<sup>2</sup> and this is the general doctrine of equity.<sup>3</sup> In a case which was decided in England in 1874, a railway company agreed for a valuable consideration with a land-owner to erect, construct and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The [251] company having refused to perform and substituted a station at a distance of two miles, the land-owner instituted a suit for specific performance. The court, under the act mentioned, held that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. The lord chancellor thus contrasted these modes of relief: "It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion; for if the view which has been already expressed is correct, supposing the court to have given him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrong-doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that, in assessing damages, every reasonable presump-

<sup>1</sup> *Scott v. Rayment*, L. R. 7 Eq. 112, 116.

<sup>2</sup> *Middleton v. Magnay*, 2 Hem. & Mill. 233; *Betts v. Gallais*, L. R. 10 Eq. 392.

<sup>3</sup> *Richmond v. Dubuque, etc.* R. Co., 33 Iowa, 422; *Black v. Black*, 15 Ga. 445; *Lewis v. Yale*, 4 Fla. 418; *McQueen v. Chouteau*, 20 Mo. 222; *Wright v. Taylor*, 9 Wend. 538.

tion may be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting, and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line, to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that if the company had *bona fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability, that if the company [252] had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All these are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this court when it discharges the functions of a jury."<sup>1</sup>

There are cases in which a vendor may obtain specific performance, although in some particulars he is unable to fulfill the contract on his part. Thus, it was allowed, though the land, which was sold at auction, was described in the particulars preceding the sale as all within a ring fence, and the house in good repair, when they were otherwise.<sup>2</sup> But in such cases the court allows compensation for the defect, if the variation be such, and to the extent that it diminishes the value of the purchase.<sup>3</sup> A purchaser is allowed more liberally than the

<sup>1</sup> *Wilson v. Northampton, etc. Ry.* *Beyer v. Marks*, 2 Sweeny, 715; *Reynolds v. Vance*, 4 Bibb, 213.

<sup>2</sup> *Dyer v. Hargrave*, 10 Ves. 505. <sup>3</sup> *Id.*; *Nagle v. Newton*, 22 Gratt. See *King v. Bardeau*, 6 Johns. Ch. 814.  
38; *Guynet v. Mantel*, 4 Duer, 94;



vendor to have specific performance in part, and compensation for the rest, where the latter is not able and cannot be compelled to completely execute the contract of sale.<sup>1</sup> And in such cases the rule of abatement is the same.<sup>2</sup>

### SECTION 3.

#### COVENANTS FOR TITLE — OF SEIZIN AND GOOD RIGHT TO CONVEY.

[253] § 591. **Their purport; when broken.** A purchaser under a general agreement to convey is entitled to a perfect title; to a deed properly framed to convey it, and containing the usual covenants.<sup>3</sup> The acceptance of a deed operates as a fulfillment of the agreement, whether the deed is strictly in conformity therewith or not, and the contract is thus merged in the deed.<sup>4</sup> Henceforth, in the absence of fraud, accident or mutual mistake, the purchaser must look to the covenants which the deed contains for his indemnity, if the title is defective or fails.<sup>5</sup> The usual covenants are, first, of seizin and good right to convey; second, of warranty and for quiet enjoyment; and third, against incumbrances. The covenants of seizin and of good right to convey are not precisely alike, but they are practically so similar that they are connected and are generally of the same import and effect, and directed to one and the same object.<sup>6</sup> The former asserts an estate in the covenantor which may pass by his deed; the other is satisfied by the covenantor having even a naked power to convey. They are generally regarded as covenants

<sup>1</sup> Wood v. Griffith, 1 Swanst. 54; Dart on Vend. & P. 499, 500; Mortlock v. Buller, 10 Ves. 315; 1 Sugd. on Vend. 351; Mestaer v. Gillespie, 11 Ves. 631, 640; Seaman v. Vawdrey, 16 id. 390; Western v. Russell, 3 V. & B. 187; Ketchum v. Stout, 20 Ohio, 453; Painter v. Newby, 11 Hare, 26.

<sup>2</sup> Dale v. Lester, 16 Ves. 7, 11; Lemon v. Brown, 4 Bibb, 308; Clagett v. Easterday, 42 Md. 617.

<sup>3</sup> Dikeman v. Arnold, 71 Mich. 656, 674; Allen v. Atkinson, 21 id. 361; Bryant v. Wilson, 71 Md. 440; Rogers v. Borchard, 82 Cal. 347; Burwell

v. Jackson, 9 N. Y. 535; Doe v. Station, 1 M. & W. 701; Shreck v. Pierce, 3 Iowa, 360; Cullum v. Branch Bank, 4 Ala. 21; Gibson v. Richart, 83 Ind. 313.

<sup>4</sup> Brandt v. Foster, 5 Iowa, 287; Wheeler v. Ball, 26 Mo. App. 443; Wheeler v. Wayne Co., 132 Ill. 599; Gibson v. Richart, 83 Ind. 313; Howes v. Barker, 3 Johns. 506; Bull v. Willard, 9 Barb. 641.

<sup>5</sup> Earle v. De Witt, 6 Allen, 520; Jobe v. O'Brien, 2 Humph. 34; Maney v. Porter, 3 id. 347.

<sup>6</sup> Howell v. Richards, 11 East, 633.

for title, not merely for possession. A covenant that one is seized in fee is a covenant for title. And whenever the covenant is expressed, as it usually is in England, in formal and precise terms, as evincing an intention to assure the highest title, it has uniformly received a construction to require the title specified.<sup>1</sup> Whenever the grantor plainly covenants [254] that he has an indefeasible estate in fee-simple, or any other specified and clearly defined estate, anything less will constitute a breach, or the covenant will be construed to bind the covenantor for the title specified. But there is great diversity in the forms of this covenant in the United States. It does not uniformly state, except as implied in the word *seized* or *seizin*, that the grantor has the highest title. In Massachusetts and Maine such an equivocal covenant is construed to mean only a seizin in fact or actual possession under color of title.<sup>2</sup> In the former state the court held this language in an action upon these covenants: "The defendant, to maintain the issue on his part, was obliged to prove his seizin when the deed was executed. But it was not necessary to show seizin under an indefeasible title. A seizin in fact was sufficient, whether he gained it by his own disseizin, or whether he was in under a disseizin. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple, by a title adverse to the owner, he was seized in fee, and had a right to convey. If the defendant's grantor had no right to convey the premises to the defendant, yet, if in fact he entered under color, though not by virtue, of that deed, and acquired a seizin by disseizin, by ousting the former owner, he has not broken these covenants."<sup>3</sup> A similar doctrine has been advanced in Nebraska and Illinois.<sup>4</sup> In the latter state, however, the law is settled, by repeated adjudications, that the covenant of seizin is

<sup>1</sup> Prescott v. Trueman, 4 Mass. 631; 146; Twambley v. Henley, 4 Mass. Smith v. Strong, 14 Pick. 128; Raymond v. Raymond, 10 Cush. 134.

<sup>2</sup> Slater v. Rawson, 1 Met. 450; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 id. 247; Abbott v. Allen, 14 Johns. 252; Collier v. Gamble, 10 Mo. 472.

<sup>3</sup> Hacker v. Storer, 8 Me. 228; Ballard v. Child, 34 id. 355.

<sup>4</sup> Scott v. Twiss, 4 Neb. 133; Watts v. Parker, 27 Ill. 224. But see Brady v. Spurck, id. 478; Furniss v. Williams, 11 id. 229.

<sup>2</sup> Marston v. Hobbs, 2 Mass. 439; Raymond v. Raymond, 10 Cush. 134.

broken as soon as made if the grantor has not the covenanted title, and delivery of possession will not satisfy it.<sup>1</sup> And in Maine if the grantee does not enter into possession he is evicted from the time the covenant is made.<sup>2</sup>

[255] § 592. **Same subject.** When the covenants in express terms, or by construction, require the conveyance of a specified title, they have effect accordingly; and if the title of the grantor, or the title which he has power to convey, is less, to the whole or any part of the granted premises the covenant is broken; in other words, the covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which his conveyance purports to convey.<sup>3</sup> Being covenants *de presenti*, if broken at any time, they are broken when made. And a suit may be brought at once though the grantee goes into possession and has not been evicted.<sup>4</sup> In England, and in some of

<sup>1</sup> Baker v. Hunt, 40 Ill. 264; Brady v. Spureck, 27 id. 478; King v. Gilson, 32 id. 348; Frazer v. Supervisors, 74 id. 291; Tone v. Wilson, 81 id. 529; Wadhams v. Swan, 109 id. 46.

<sup>2</sup> People's Savings Bank v. Hill, 81 Me. 71.

<sup>3</sup> Howell v. Richards, 11 East, 633; Gray v. Briscoe, Noy, 142; Guthrie v. Pugsley, 12 Johns. 126; Kingdon v. Nottle, 4 M. & S. 53; Smith v. Strong, 14 Pick. 128; Park v. Cheek, 4 Cold. 20; Kincaid v. Brittain, 5 Sneed, 119; Gilbert v. Buckley, 5 Conn. 262; Hall v. Gale, 20 Wis. 292; Parker v. Brown, 15 N. H. 176; Pickering v. Staples, 5 S. & R. 107; Mott v. Palmer, 1 N. Y. 573.

<sup>4</sup> Benton Co. v. Rutherford, 33 Ark. 640; Brandt v. Foster, 5 Iowa, 287; Sac Co. Bank v. Foster, 77 id. 435; Price v. Deal, 90 N. C. 290; Dickey v. Weston, 61 N. H. 23; McInnis v. Lyman, 62 Wis. 191 (unoccupied lands); Morrison v. Underwood, 20 N. H. 369; Triplett v. Gill, 7 J. J. Marsh. 438; Spencer's Case, 1 Smith's Lead. Cas. pt. 1, p. \*179; Smith v. Jeffs, 44 N. H. 482; Bartholomew v. Candee,

14 Pick. 167; Lawless v. Collier, 19 Mo. 480; Pringle v. Witten's Ex'r, 1 Bay, 256; Abbot v. Allen, 14 Johns. 252; Brady v. Spureck, 27 Ill. 478; McCarty v. Leggett, 3 Hill, 134; Mott v. Palmer, 1 N. Y. 573; Pollard v. Dwight, 4 Cranch, 421; Chapman v. Holmes, 10 N. J. L. 24; Fowler v. Poling, 2 Barb. 300; Garrison v. Sandford, 12 N. J. L. 261; Fitzhugh v. Crogan, 2 J. J. Marsh. 429; Lawrence v. Montgomery, 37 Cal. 183, 188; Murphy v. Price, 48 Mo. 247; Mitchell v. Warner, 5 Conn. 497; Dale v. Shively, 8 Kan. 276; Innes v. Agnew, 1 Ohio, 179; Kennison v. Taylor, 18 N. H. 220; Morrison v. Underwood, 20 id. 369; Parker v. Brown, 15 id. 176; Bickford v. Page, 2 Mass. 455; Gilbert v. Bulkley, 5 Conn. 262; Clark v. Swift, 3 Met. 390; Logan v. Moulder, 1 Ark. 313; Ingram v. Morgan, 4 Humph. 66; Craig v. Donovan, 63 Ind. 513. It was held in this case that a deed executed in Indiana of lands in another state should be governed by the laws of the latter as to the conveyance; but the covenant of seizin should be expounded by the

the states, it is held that these covenants run with the land, if there is not a total breach at first. A distinction is made between a mere formal breach, from which no injury results, and a final and complete breach, by which the possession is lost or other actual injury sustained. It is held that where the covenantor is in possession claiming title, and delivers possession to the covenantee, the covenant of seizin is not a mere present engagement, made for the sole benefit of the [256] covenantee, but is one of indemnity, entered into in respect to the land conveyed, and intended for the security of all subsequent grantees, when it is finally and completely broken; and consequently, on such nominal breach when the covenant is made, no such right of action accrues to the covenantee as is sufficient to arrest the covenant, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when the eviction takes place or other real injury is sustained. The possession of the land, or seizin in fact under the deed by the covenantee and those claiming through him, is considered such an estate as carries the covenant along with it.<sup>1</sup> In Ohio the covenant of seizin is held to be one for title; that it runs with the land where the grantor has an actual seizin; but that it is broken in such a case only when there has been an actual disturbance of the purchaser, or some one claiming under him; or, in other words, until actual injury is sustained there is not even a nominal breach. If, however, there is no actual seizin and nothing passes by the deed the covenant is broken immediately.<sup>2</sup> The general doctrine held in this country, however, is that these are personal covenants; and if broken at all are so at the moment they are made, and are thereby turned into mere rights of action incapable of assignment, or of being sued upon

laws of Indiana, and if false was broken immediately.

<sup>1</sup> Rawle on Cov. Tit. 325, and note; 4 Kent's Com. 472; Kingdon v. Nottle, 4 M. & S. 53; Schofield v. Iowa Homestead Co., 32 Iowa, 317; Martin v. Baker, 5 Blackf. 232; McCradey's Ex'r v. Brisbane, 1 N. & McC. 104; Mecklem v. Blake, 22 Wis. 495; Eaton v. Lyman, 30 id. 41; Boon v. Mc-

Henry, 55 Iowa, 202; Cockrell v. Proctor, 65 Mo. 41; Allen v. Kennedy, 91 id. 324; Graham v. Baker, 10 Up. Can. C. P. 426; Scriver v. Myers, 9 id. 225; Banon v. Frank, 14 id. 295.

<sup>2</sup> Backus v. McCoy, 3 Ohio, 211; Foote v. Burnett, 10 id. 334; Devore v. Sunderland, 17 id. 60; Stambaugh v. Smith, 23 Ohio St. 584, 588; Great Western Stock Co. v. Saas, 24 id. 542.



at law by any but the covenantee and his personal representatives.<sup>1</sup> The covenant is broken if the grantor has not the very estate in quantity and quality which he purports to convey.<sup>2</sup> It is broken if another has a paramount right to divert a natural spring;<sup>3</sup> or if the deed contains a conveyance of and covenant for raising a dam to a certain height, and raising it to that height would cause a tortious flooding of lands belonging to third persons.<sup>4</sup> The covenant extends not only to the land itself, but to all such things as should be properly appurtenant to it, and pass by conveyance of the freehold. Thus it has been held to be broken where the grantor had, before the conveyance, sold to another a quantity of rails which had been erected into a fence and thereby became a fixture.<sup>5</sup> And the same doctrine has been applied generally to buildings and other fixtures upon the land, the right to remove which was vested in other parties, and did not pass to the purchaser by the conveyance.<sup>6</sup> A judgment perpetually enjoining the grantee from using an easement which the grantor assumed to convey may be treated as an eviction.<sup>7</sup> In cases of such breaches, the plaintiff is entitled to recover damages according to the difference in value between the property in the condition it was covenanted to be and its actual condition.<sup>8</sup>

[257] § 593. **Damages for breach of these covenants.** For a total breach of the covenant of seizin or good right to con-

<sup>1</sup> Rawle on Cov. Tit. 319, 320; Wilson, 4 Johns. 72; Bartholomew v. Greenby v. Wilcocks, 2 Johns. 1; Candee, 14 Pick. 167; Lot v. Thomas, 2 N. J. L. 297; Carter v. Denman, 23 id. 260.

<sup>2</sup> Howell v. Richards, 11 East, 633.

<sup>3</sup> Clark v. Conroe, 38 Vt. 469.

<sup>4</sup> Walker v. Wilson, 13 Wis. 522; Hall v. Gale, 20 id. 292; Adams v. Conover, 87 N. Y. 422.

<sup>5</sup> Mott v. Palmer, 1 N. Y. 564.

<sup>6</sup> Powers v. Dennison, 30 Vt. 752; Van Wagner v. Van Nostrand, 19 Iowa, 427; West v. Stewart, 7 Pa. St. 122; Rawle on Cov. Tit. (4th ed.) 78, 79.

<sup>7</sup> Scheible v. Slagle, 89 Ind. 323.

<sup>8</sup> Hall v. Gale, 20 Wis. 292.

vey, where nothing passes by the conveyance, the measure of damages is the amount of the consideration paid and interest.<sup>1</sup> And the same rule applies where there is a breach as to quantity of land.<sup>2</sup> This measure is not affected by the fact that intermediate the conveyance and the discovery that the title is defective, the value of the land has been largely enhanced by improvements or by other causes. A recovery of its value, as estimated by the parties at the time of the purchase, is precisely in accord with the standard of redress afforded by the ancient writ of *warrantia chartæ*; and this standard is now maintained as politic and just. In an early New York case<sup>3</sup> Kent, C. J., said: "Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now [258] speak), the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual

<sup>1</sup> Horn v. Walton, 117 Ill. 130, 135; Price v. Deal, 90 N. C. 290; Wilson v. Peelle, 78 Ind. 384; Wright v. Nipple, 92 id. 310; Rhea v. Swain, 122 id. 272; Norman v. Winch, 65 Iowa, 263; Conrad v. Trustees Grand Grove, etc., 64 Wis. 258; Bibb v. Freeman, 59 Ala. 612; McInnis v. Lyman, 62 Wis. 191; Bickford v. Page, 2 Mass. 455; Sumner v. Williams, 8 id. 162; Leland v. Stone, 10 id. 459; Ela v. Card, 2 N. H. 175; Morse v. Shattuck, 4 id. 229; Marston v. Hobbs, 2 Mass. 433; Caswell v. Wendell, 4 id. 108; Smith v. Strong, 14 Pick. 128; Stubbs v. Page, 2 Me. 378; Wilson v. Forbes, 2 Dev. L. 30; Willson v. Willson, 25 N. H. 229; Nutting v. Herbert, 35 id. 120; Mitchell v. Hazen, 4 Conn. 495; Sterling v. Peet, 14 id. 245; Henning v. Withers, 3 Brev. 458; Tapley v. Lebaume, 1 Mo. 550; Martin v. Long, 3 id. 391; Lawless v. Collier, 19 id. 480; Frazer v. Supervisors, 74 Ill. 291; Cummins v. Kennedy, 3 Litt. 118; Logan v. Moulder, 1 Ark. 313; Backus v. McCoy, 3 Ohio, 211; Clark v. Parr, 14 id. 118; Kimball v. Bryant,

25 Minn. 496; Cox v. Strode, 2 Bibb, 277; Nichols v. Walter, 8 Mass. 243; Chapel v. Bull, 17 id. 213; Greenby v. Wilcocks, 2 Johns. 1; Hacker v. Storer, 8 Me. 228; Bonta v. Miller, 1 Litt. 250; Blackwell v. Justices, 2 Blackf. 143; Lacey v. Marnan, 37 Ind. 168; Sheets v. Andrews, 2 Blackf. 274; Overhiser v. McCollister, 10 Ind. 41; Kincaid v. Brittain, 5 Sneed, 119; Recohs v. Younglove, 8 Baxter, 385; Park v. Cheek, 4 Cold. 20; Hacker v. Blake, 17 Ind. 97; Hodges v. Thayer, 110 Mass. 286; Farmers' Bank v. Glenn, 68 N. C. 35; Foster v. Thompson, 41 N. H. 373; Brandt v. Foster, 5 Iowa, 287; Blossom v. Knox, 3 Pin. (Wis.) 262; Blake v. Burnham, 29 Vt. 437; Phipps v. Tarpley, 31 Miss. 433; Campbell v. Johnston, 4 Dana, 182; St. Louis v. Bissell, 46 Mo. 157.

<sup>2</sup> Sears v. Stinson, 3 Wash. St. 615; Nelson v. Matthews, 2 Hen. & Munf. 164; Bond v. Quattlebaum, 1 McCord, 584; Morris v. Owens, 3 Strobb. 199; Blessing v. Beatty, 1 Rob. (Va.) 287. See Cornell v. Jackson, 3 Cush. 506.

<sup>3</sup> Staats v. Ten Eyck, 3 Cai. 111.

error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin." And again: "To find a proper rule of damages in a case like this is a work of some difficulty. No one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud may also be attended with injustice if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who for the sake of one hundred pounds would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages when no fraud has been practiced, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on the civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; [259] but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered

by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum on which he may reasonably have calculated, being founded in natural law and equity, ought, in his opinion, to be followed, and care taken that damages in the case be not excessive. Rather than adhere to the rule of Justinian, or to leave the matter to the opinion of a jury, as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate the return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule."<sup>1</sup>

<sup>1</sup> *Pitcher v. Livingston*, 4 Johns. 1; *Bender v. Fromberger*, 4 Dall. 436; *Rawle on Cov. Tit.* (4th ed.), 238.

Mr. Rawle, in his excellent work on Covenants for Title, says: "In certain parts of the United States unimproved ground is frequently conveyed to a purchaser in fee, reserving to the vendor, as the entire consideration, an annual fee farm or ground rent which represents the value of the land, the purchaser covenanting that he will, for the purpose of securing to the vendor the rent so reserved, erect certain stipulated improvements. In this class of cases, the improvements being directly within the contract of the parties, and one of its inducements, it would seem that if the land thus improved were subsequently lost by reason of a defect of title or incumbrance created by the vendor, the damages should not be limited by the consideration, but might with propriety be increased by the value of the improvements thus made; and if there could be any doubt as to the liability of the vendor to this extent in case the defect or incumbrance were not created by himself, although within the covenants he might have given, there would seem to be none where

the loss was the consequence of his own act." 5th ed., § 170. It is said in a note that "there is no direct authority for this suggestion, but it is quoted with approval in *Field on Damages*, § 497, and 2 *Sutherland on Damages*, 259, and since it was made the following has been said by an English writer: 'I conceive that the doctrine laid down by Kent, C. J., in *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still, he would only be repaying money which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and no more. But the same obvious equity seems by no means to exist when the additional value arises on the outlay of the plaintiff's own cap-



[260] Where, for some purpose of the vendor, the purchaser, as part of the consideration of the sale, undertakes to make improvements upon the purchased property, it would be manifestly just and in accord with the general principles that, in case of a subsequent loss of it by reason of a defect of title, the value of such improvements should be included in the assessment of damages, not only in an action for breach of these covenants, but any others which might be broken by such deprivation.<sup>1</sup> If there has been a constructive eviction, and before an action is begun upon the covenant the grantee's title becomes perfect by an after-acquired title of the grantor inuring to his benefit, the grantee may recover indemnity for damage done to the land by the acts of the owners of the adverse title.<sup>2</sup> In Wisconsin a married woman who joins in the execution of a deed for the sole purpose of barring her dower right in the land conveyed is not personally liable on the covenant of seizin.<sup>3</sup>

§ 594. **Actual consideration may be proved.** What the consideration of the sale is, as a basis of recovery for breach of these covenants, as well as of all the others, is open to proof as a fact *in pais*; and the statement of it in the deed is only *prima facie* evidence of the amount. That recital does not preclude other proof or even parol evidence of the actual consideration, although it may establish a different one in kind or amount from that mentioned in the deed.<sup>4</sup> It may

ital upon the land. No doubt cases might be put in which claim of damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and choose to reclaim the one or build a mansion with pleasure grounds upon the other. But suppose he purchased building ground, at so much per foot, in London or Manchester, for the express object of building; ought he not to be repaid for money laid out in this way, the benefit of which is seized by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been con-

templated by the party entering into the covenant. Probably this will be found to be the true ground of distinction, and that every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not.' Mayne on Damages (3d ed.), 182. See also, 2 Dart on Vendors (5th ed.), 793."

<sup>1</sup> Id.; Gibert v. Peteler, 38 N. Y. 165.

<sup>2</sup> McInnis v. Lyman, 62 Wis. 191.

<sup>3</sup> Semple v. Whorton, 68 Wis. 626.

<sup>4</sup> Louisville, etc. Ry. Co. v. Neafus, 18 S. W. Rep. 1030 (Ky.); Morse v. Shattuck, 4 N. H. 229; Barns v. Learned, 5 id. 264; Nutting v. Her-

be thus shown that one of several parcels included [262] in the deed was inserted by mistake, and that nothing was

bert, 35 id. 120; S. C., 37 id. 346; Bingham v. Weiderwax, 1 N. Y. 509, 514; Belden v. Seymour, 8 Conn. 304; Swafford v. Whipple, 3 G. Greene. 261; Hallum v. Todhunter, 24 Iowa. 166; Williamson v. Test, id. 138; Byrnes v. Rich, 5 Gray, 518; Harlow v. Thomas, 15 Pick. 66; Hodges v. Thayer, 110 Mass. 286; Goodspeed v. Fuller, 46 Me. 141; Cushing v. Rice, id. 303; Martin v. Gordon, 24 Ga. 533; Moore v. McKie, 5 Sm. & M. 238; Guinotte v. Chouteau, 34 Mo. 154; Rawle on Cov. Tit. (4th ed.) 258; Gavin v. Buckles, 41 Ind. 528; Henderson v. Henderson, 13 Mo. 151; Bircher v. Watkins, id. 521; Pecare v. Chouteau, id. 527; Engleman v. Craig, 2 Bush, 424.

In Yelton v. Hawkins, 2 J. J. Marsh. 1, relief in equity was granted on grounds which imply that such evidence is inadmissible at law. A bill was filed for relief against an excessive judgment for damages on a covenant of warranty. The judgment had been taken for the amount of the consideration stated in the deed, 86*l.*, alleged in the bill to be penalty and inserted in the deed through mistake, 43*l.* being the actual consideration. The relief was granted, enjoining the collection of one-half of the judgment. The court thus explains: "The chancellor had power to relieve against the mistake. Hawkins could not have resisted a judgment at law for the amount of consideration mentioned in the deed, because he would not have been able to prove the mistake: therefore he could make no defense on this ground at law, and, consequently, as he has clearly established the mistake, it was the duty of the chancellor to grant him relief to the extent of the

mistake. If he could have proved the mistake on the trial at law, still, as he did not defend the suit and rely on that ground, the chancellor will relieve him as readily as if there had been fraud." See Trumbo v. Curtright, 1 A. K. Marsh. 582; Burke v. Beveridge, 15 Minn. 205; Steel v. Worthington, 1 Ohio, 350; Maigley v. Hauer, 7 Johns. 341; Jackson v. Delaney, 4 Cow. 427.

In Mayne on Damages (4th Eng. ed.), 203, the author says: "Where the damages are to be calculated upon the basis of the purchase-money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any consideration is mentioned, if it is not said also, 'and for other considerations,' you cannot enter into any proof of any other; the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other." He cites Lord Hardwicke in Peacock v. Monk, 1 Ves. Sr. 128; Rowntree v. Jacob, 2 Taunt. 141; Baker v. Dewey, 1 B. & C. 704. But, as Mr. Rawle correctly remarks, "none of these cases (nor Lampon v. Corke, 5 B. & Ald. 606) directly support the proposition." Rawle on Cov. Tit. (5th ed.), § 173, note 3. This author says: "On this side of the Atlantic it may be considered as settled that although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible to defeat the conveyance as such; as, for example, by showing it void for want of consideration, as in Wilt v. Franklin, 1 Bin. 502; Farrington v. Barr, 36 N. H. 89; Hurn

paid for it;<sup>1</sup> that the consideration was property; and then its value at the date of the conveyance, with interest, will be

v. Soper, 6 Har. & J. 276; Betts v. Union Bank, 1 Har. & G. 175; Claggett v. Hall, 9 Gill & J. 91; Cole v. Albers, 1 Gill, 423; Elysville Manuf. Co. v. Okisko Co., 1 Md. Ch. 392; Henderson v. Henderson, 13 Mo. 151; yet that for any purpose short of affecting the title, this clause is not conclusive, but only *prima facie* evidence of the amount therein named. Bullard v. Briggs, 7 Pick. 533; Wade v. Merwin, 11 id. 280; Clapp v. Tirrell, 20 id. 247; McCrea v. Purmort, 16 Wend. 460; Burbank v. Gould, 15 Me. 118; Meeker v. Meeker, 16 Conn. 383; Beach v. Packard, 10 Vt. 96; Bingham v. Weiderwax, 1 N. Y. 509; Watson v. Blaine, 12 S. & R. 131; Bolton v. Johns, 5 Pa. St. 145; Higdon v. Thomas, 1 Har. & G. 139; Wolfe v. Hauver, 1 Gill, 84; Duval v. Bibb, 4 Hen. & M. 113; Harvey v. Alexander, 1 Rand. 219; Wilson v. Shelton, 9 Leigh. 343; Curry v. Lyles, 2 Hill (S. C.), 404; Jones v. Ward, 10 Yerg. 160; Park v. Cheek, 2 Head, 451;

Garrett v. Stuart, 1 McCord, 514; Gulley v. Grubbs, 1 J. J. Marsh. 388; Hartley v. McAnalty, 4 Yeates, 95; Hayden v. Mentzer, 10 S. & R. 329; Dexter v. Manley, 4 Cush. 26; Jack v. Dougherty, 3 Watts, 151, where the language of Parker, C. J., in Bullard v. Briggs, is approvingly quoted; Monahan v. Colgin, 4 Watts, 436; Strawbridge v. Cartledge, 7 W. & S. 399; Click v. Green, 77 Va. 827. In other words, the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed were merely to prevent a resulting trust to the grantor, the claim being merely formal and nominal, and not designed to fix conclusively the amount paid or to be paid. Belden v. Seymour, 8 Conn. 312."

In Shorthill v. Ferguson, 44 Iowa, 249, the defendant had sold land and

<sup>1</sup> Leland v. Stone, 10 Mass. 459; Nutting v. Herbert, 35 N. H. 121; S. C., 37 id. 346; Barns v. Learned, 5 id. 264; Stewart v. Hadley, 55 Mo. 235.

Leland v. Stone, *supra*, has been criticised on the point to which it is cited, and is disapproved in Spurr v. Andrews, 6 Allen, 420; Harlow v. Thomas, 15 Pick. 66; Bruns v. Schreiber, 43 Minn. 468. In Semple v. Whorton, 68 Wis. 626, 637, an action to recover for the breach of the covenant of seizin as to part of the land conveyed, Leland v. Stone was cited to sustain the proposition that the value of the land was not to be determined from the actual and visible conditions of the several tracts

at the time of the purchase, but from the conditions then supposed to exist or contemplated by the parties, or one of them. In other words, that the tract to which the title failed should be considered in estimating values the same as though it was, when sold, unimproved, as were the other tracts, instead of an improved farm, which the parties did not know it to be. This contention, it was conceded by the court, derived some support from that case; and while it was held that the testimony did not warrant the application of the rule contended for, if it is a rule, doubt is thrown upon the authority of the case, and consequently upon the cases which follow it.

the measure of damages.<sup>1</sup> But if the parties at that time agreed upon its value as a consideration, such value, rather than that which might be ascertained by evidence on the trial, will be adopted as the basis of recovery.<sup>2</sup>

**§ 595. When consideration does not measure damages.**

In cases where this measure cannot be applied, as where [263] the consideration cannot be ascertained,<sup>3</sup> or where it is paid by a third person on whose request the conveyance with the covenants is made,<sup>4</sup> so that the damages must be determined according to the circumstances of the particular case, the value of the land at the time of the intended conveyance with interest from that date will be the measure of damages.<sup>5</sup> It does not matter that the consideration is in fact paid or delivered to another person than the grantor; or that it is itself before delivery the property of another than the grantee; provided that it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. Their contract creates the privity between them in relation to the consideration, and constitutes it the price of the agreed conveyance. It thereby becomes the measure of the grantee's

conveyed it with covenants of warranty and of right to convey, and stated the consideration in the deed to be \$500, although in fact it was much less. The grantee sold and conveyed to the plaintiffs. On a total breach, by which the plaintiffs were entitled to full damages, the question was raised whether the damages were limited to the real consideration received by the defendant from his grantee, or whether the plaintiffs were entitled to the amount of the consideration expressed in the deed. And the court say: "Parol proof of consideration to contradict that expressed in the deed is admissible between the original parties, but it is not admissible in a suit against the original grantor by one to whom his grantee has transferred the land. *Greenvault v. Davis*, 4 Hill, 643. We are of opinion, therefore, that the plaintiffs are entitled to recover,

upon tender of conveyance to defendant, the sum of \$500, and interest thereon at six per cent. from the date of the deed. . . . The consideration in the defendant's deed is to be taken as a conclusive admission by defendant." *Hunt v. Orwig*, 17 B. Mon. 73; *Hanson v. Buckner*, 4 Dana, 251.

As between persons not parties to it, the consideration stated in a deed is not *prima facie* evidence of the value of the land. *Allen v. Kennedy*, 91 Mo. 324.

<sup>1</sup> *Hodges v. Thayer*, 110 Mass. 286; *Bonnon's Estate v. Urton*, 3 G. Greene, 228; *Lacey v. Marnan*, 37 Ind. 168. See *Davis v. Hall*, 2 Bibb, 590.

<sup>2</sup> *Williamson v. Test*, 24 Iowa, 138.

<sup>3</sup> *Smith v. Strong*, 14 Pick. 123.

<sup>4</sup> *Byrnes v. Rich*, 5 Gray, 518.

<sup>5</sup> *Id.*



loss.<sup>1</sup> Shaw, C. J., said:<sup>2</sup> “The rule of damages is perfectly well settled in this commonwealth; it is the amount of the consideration actually paid by the grantee to the grantor, with interest from the time of the payment. We say paid by the grantee to the grantor, which is the most common case. But there may be anomalous cases, especially where it is not a direct negotiation between the parties to the deed, but where, in a negotiation between two, there is a stipulation by one with the other, upon a certain consideration, to execute a deed, and convey certain land to a third person, and a deed is given accordingly.” He stated the case under consideration, to which his observations applied: “The plaintiff agreed to receive of one L. a certain lot of land in M. in full satisfaction and discharge of a debt. L. then agreed with the defendant to purchase of him the same land, and then requested the defendant to make the deed direct to the plaintiff with warranty; he executed it accordingly, upon a large nominal consideration expressed, and handed it to L., who delivered it to the plaintiff in satisfaction of his debt. Then [264] what was the actual consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by L.; to that the plaintiff is a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principle applicable to breaches of contracts: the party shall recover a sum in damages which will be a compensation for the loss. The case is very similar in principle, and considerably so in its facts, to that of *Smith v. Strong*.<sup>3</sup> It was there laid down that in such case the measure of damages is the consideration paid with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance with interest from the date of the deed will be the measure of damages. It appears to us that this rule will afford indemnity in the present case. If the failure of title extended

<sup>1</sup> *Hodges v. Thayer*, 110 Mass. 286.    <sup>3</sup> 14 Pick. 128.

<sup>2</sup> *Byrnes v. Rich*, *supra*.

to the whole of the land, then the entire value of the land is the measure; if to part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part the title to which failed with interest will be taken as the measure of damages."<sup>1</sup>

§ 596. **Effect of recovery on a total breach.** Where there is a breach of these covenants extending to the entire subject of the purchase, and the plaintiff has never got into possession, and, in consequence of the want of title, never can, the recovery of the purchase-money and interest is clearly and uniformly held to be the proper measure of damages. The action on the covenant then comes in place of an action for money had and received on failure of consideration.<sup>2</sup> The action on the covenant does not, however, proceed, as an action for money had and received does, upon the theory of rescission, though practically the result is the same. [265] The recovery of damages for such a breach is a bar to any further recovery;<sup>3</sup> and hence the covenant would have no validity afterwards. On a breach, its force is spent, and the covenantee has but a right of action. Satisfaction of the judgment for damages may, moreover, well have the effect to preclude the assertion of any right under the conveyance. It would be manifestly unjust that a grantee should recover either the purchase-money or the value of the land against the grantor, upon an alleged breach of covenant that nothing passed by the deed, and yet that he should be considered the owner of the land under the very deed which he had alleged to be inoperative.<sup>4</sup> When a warrantee in *warrantia chartæ* recovers and has a seizin of other lands of the warrantor to their value, he cannot afterwards recover of the warrantor lands warranted. For although the warrantor cannot aver

<sup>1</sup> See *Staples v. Dean*, 114 Mass. 125; *Middleton*, 2 Str. 1259; *Rawle on Rechos v. Younglove*, 8 Baxter, 385. *Cov. Tit.* (5th ed.), § 178 and note.

<sup>2</sup> *Baber v. Harris*, 9 A. & E. 532; *Stinson v. Sumner*, 9 Mass. 143; *Mayne on Dam.* (4th Eng. ed.) 197. *Parker v. Brown*, 15 N. H. 176; *Porter v. Hill*, 9 Mass. 34; *Blanchard v. Ellis*, 1 Gray, 202; *Kincaid v. Brittain*, 5 Sneed, 119. See *Johnson v. Simpson*, 36 N. H. 96.

<sup>3</sup> *Duchess of Kingston's Case*, 2 Smith's L. Cas. (7th ed.) 778; *Outram v. Morewood*, 3 East, 346; *Donnell v. Thompson*, 10 Me. 174; *Nosler v. Hunt*, 18 Iowa, 212; *Markham v.*

against his own deed, yet the warrantee may aver against that deed; and if his averments are verified by matter of record the warrantor may afterwards avail himself of that record against the warrantee, the record being of a higher nature than a deed.<sup>1</sup>

§ 597. **Only nominal damages recovered if actual loss not shown.** Any recovery beyond nominal damages is dependent upon proof of actual loss, and is restricted to it. In *Hartford and Salisbury Ore Co. v. Miller*<sup>2</sup> the court say: "The general rule is in actions upon contracts that the plaintiff shall recover the actual damages sustained. An action for breach of the covenant of seizin in a deed is not an exception to the rule. It is doubtless true that in such actions generally the actual damage is in fact the consideration paid and interest, because the party takes nothing by his deed. It is in its inception, [266] and continues to be, a nullity. But if the party takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in estimating the damages." The whole consideration money and interest cannot be the criterion of damages except in those cases where the purchaser derives no benefit from the conveyance. The consideration and interest is *prima facie* the damage resulting from the breach; but this may be varied by circumstances.<sup>3</sup> If the grantor is in actual possession, but without any title, in theory at least he can confer no benefit on his grantee by the ceremony of making a deed to him and delivering possession. The deed would vest no title, and, the possession being wrongful, the purchaser would incur a liability to the true owner for his occupation. Such a transaction, at best, would only give the purchaser an opportunity by continuous wrong to acquire title by virtue of the statute of limitations. In such a case may not the purchaser, although in actual possession, elect to consider himself an actual loser in respect to the whole subject of the purchase? His actual possession is no objection, except as it affects the amount of damages; for as we have

<sup>1</sup> *Porter v. Hill*, 9 Mass. 34; *Foss v. Stickney*, 5 Me. 390.

<sup>2</sup> 41 Conn. 112.

<sup>3</sup> *Kimball v. Bryant*, 25 Minn. 496; *Cockrell v. Proctor*, 65 Mo. 41; *Smith v. Hughes*, 50 Wis. 620.

seen, eviction is not necessary to give him a cause of action. It is no defense that he is in the undisturbed possession of the premises.<sup>1</sup> If he so elects, and recovers full damages as upon a total breach, the grantor may resume possession, and the parties are in *statu quo*, except that the purchaser has had possession, with its practical benefits, and there is only a possibility of being made to pay damages for it to the true owner: but this possession is deemed only the equivalent of interest on the purchase-money, and hence is to be considered only in that connection.<sup>2</sup>

A grantor may, before the eviction of his grantee, buy in the outstanding title and relieve himself from liability upon his covenants. The grantee is possessed of the same right, and may recover the amount paid for such purpose if it was reasonable and not in excess of the purchase price. A grantee cannot convey a greater right than this to his grantee.<sup>3</sup> If a remote grantee exercises such right and it does not appear what sum he paid, no more than nominal damages can be recovered.<sup>4</sup> In states where the covenant is held to run with the land, if the grantee has taken possession under his deed, he can recover only nominal damages until he has been compelled, by the assertion of the paramount title, to yield possession to the claimant. He has no right to abandon the possession and claim substantial damages.<sup>5</sup>

Although there has been some hesitation with text- [267] writers to regard such a case as one for recovery of full damages, measured by the consideration money,<sup>6</sup> yet it is believed

<sup>1</sup> Akerly v. Vilas, 21 Wis. 109.

<sup>2</sup> Recoils v. Younglove, 8 Baxter, 385, 387.

<sup>3</sup> Conrad v. Trustees Grand Grove, etc., 64 Wis. 258.

<sup>4</sup> Snell v. Iowa Homestead Co., 59 Iowa, 701.

<sup>5</sup> Boon v. McHenry, 55 Iowa, 202; Heneke v. Johnson, 62 id. 555; Norman v. Winch, 65 id. 263; Wilson v. Irish, 62 id. 260; Axtel v. Chase, 77 Ind. 74; Cockrell v. Proctor, 65 Mo. 41.

<sup>6</sup> 4 Dane's Abridgment, p. 340; Mayne on Damages (4th ed.), 197.

This author says: "Where the plaintiff has never got into possession, and in consequence of the want of title never can, the above is clearly the proper measure of damages. . . . But it may be doubted whether the same rule would hold good as a matter of law, where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsalable, though there is little or no chance of the occupant ever being



that in those jurisdictions at least where these covenants are not regarded as continuing and running with the land, the consideration money with interest, less any benefit the grantee has obtained from possession, is generally accepted as the proper measure of damages.<sup>1</sup> In *Parker v. Brown*<sup>2</sup> Parker, C. J., said: "No wrong is done by the maintenance of the action; for if the grantee recovers damages for the breach of the covenant of seizin, on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards as a conveyance of the land against the grantor. We see not why the grantor may not again enter, if he chooses, as against the grantee. A recovery in trespass or trover, with satisfaction, vests the property in the party against whom the damages were assessed. The defendants may re-enter if they think proper, and will hold under their former possession against all persons who cannot show a better right. We are not aware of anything in the nature of the feudal investiture, or in the principles which regulate the title to land at the [268] present time, that should require a different rule in relation to real estate. The record of the recovery will furnish as good an estoppel as that which arises from a disclaimer."<sup>3</sup>

. . . The measure of damages for the breach of the covenant of seizin is the value of the land at the time of the conveyance, which may be determined by the consideration paid. This was stated to be the rule in this case, and it is not controverted that the consideration expressed in the deed was the evidence of value."<sup>4</sup>

turned out. In such a case it would not be fair to allow the whole purchase-money to be recovered. The vendor has not given a salable title as he engaged; but he has given up his possessory title, which was worth something to him, and is worth something to the purchaser."

In the first edition of *Rawle on Covenants for Title* (p. 83) it was said: "If nothing had been paid, and no pecuniary loss had been suffered, and the possession had not been disturbed, it is believed that nominal

damages only would in general be allowed. The technical rule, therefore, that the covenant of seizin is broken, if at all, at once and completely, is, as respects the damages, little more than a technical one." See *post*, note; *Collier v. Gamble*, 10 Mo. 472; *Mason v. Cooksey*, 51 Ind. 519.

<sup>1</sup> *Tone v. Wilson*, 81 Ill. 529; *Flint v. Steadman*, 36 Vt. 210.

<sup>2</sup> 15 N. H. 176, 188.

<sup>3</sup> *Hamilton v. Elliot*, 4 N. H. 182.

<sup>4</sup> *Park v. Cheek*, 4 Cold. 20; *Tone*

§ 598. **Same subject.** Possession without title may compensate for the interest on the purchase-money if there be no liability which will be enforced to the real owner. But the question whether such owner will ever claim the land must remain open until he is precluded by lapse of time; and the mere fact that the purchaser presently obtains no title renders his conveyance nugatory — valueless — unless so much time of adverse possession has elapsed as to afford assurance of the continued silence and inaction of that owner. The purchaser derives no property or value in the land. It does not become his; he cannot safely improve it; his claim to it has no other value than such as attaches to it in view of the possible extinction of the superior right by non-claim. That the absence of title is an element of damage which may be the basis of recovery, although there is no disturbance of possession, and indeed can be none, is evident from those cases in which the grantor undertook to convey a fee and covenanted accordingly, having only a less estate in possession. In such cases [269] the rule has been applied to merely deduct the value of the less estate conveyed from the amount which would be recoverable for a total breach;<sup>1</sup> or to allow to be recovered the difference between the covenanted and the conveyed estate.<sup>2</sup>

Where, however, there have been such forms of conveyance to the grantor that the defect of title is only a technical one,

*v. Wilson*, 81 Ill. 529; *Frazer v. Supervisors*, 74 id. 282; *Kincaid v. Britain*, 5 Sneed, 119; *Richard v. Bent*, 59 Ill. 38; *Lawless v. Collier*, 19 Mo. 480; *Harris v. Newell*, 8 Mass. 262; *Bickford v. Page*, 2 id. 455; *Mitchell v. Hazen*, 4 Conn. 495; *Horsford v. Wright*, Kirby, 3; *Castle v. Peirce*, 2 Root, 294; *Caulkins v. Harris*, 9 Johns. 324. See *Tarpley v. Poage*, 2 Tex. 139; *Copeland v. Gorman*, 19 id. 253; *Cooper v. Singleton*, id. 260. In the fourth edition of *Rawle on Covenants for Title* in note 3, p. 281 (see *ante*, p. 1323, n. 1), the author says: "Upon subsequent consideration the opinion was formed that . . . (the passage quoted in the preceding note) did not correctly express the law,

and it was omitted in the second edition. . . . It is believed . . . that if the breach of the covenant has occurred, affecting the whole title (for where it touches part only, *Morris v. Phelps*, 5 Johns. (N. Y.) 56, is a distinct authority that the purchaser has no authority to rescind), the plaintiff has a right to recover damages measured by the consideration money." See *Hacker v. Blake*, 17 Ind. 97; *Cockrell v. Proctor*, 65 Mo. 41.

<sup>1</sup>*Tanner v. Livingston*, 12 Wend. 83; *Guthrie v. Pugsley*, 12 Johns. 126; *Lockwood v. Sturdevant*, 6 Conn. 373; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Mills v. Catlin*, 22 Vt. 98.

<sup>2</sup>*Gray v. Briscoe*, Noy, 142.

and there has been long possession under the conveyance, though not for the full period to quiet the title under the statute of limitations, if nothing has been paid or done to extinguish or acquire the paramount title, it is perhaps an unanswered question in the books whether full damages could be recovered, in the absence of any actual assertion of that title. Would there not be wanting the element of actual loss or danger of actual loss, which is essential to justify the assessment of damages on that basis? If the outstanding title has been bought in by the covenantee, and there was none in the covenantor, recovery might be had for the amount paid for it, to the limit recoverable for a total breach of these covenants.<sup>1</sup>

<sup>1</sup> *Lawless v. Collier*, 19 Mo. 480, is an instructive case upon the point here suggested. The opinion contains a valuable summary of the law relating to damages for breach of the covenant of seizin, and applies it to a novel state of facts. Scott, J.: "On the 29th day of September, 1831, George Collier, for the sum of \$800, conveyed to H. R. Gamble, in fee, sixteen and a fraction acres of land, with a covenant that he was seized of an indefeasible estate therein. On the 8th of November, 1834, Collier conveyed to Gamble twenty-four and ninety-one one-hundredths acres of land for the sum of \$1,868, with a like covenant as in the first deed. These two tracts were contiguous and made one parcel; and on the 14th day of March, 1836, were conveyed by Gamble to Adam L. Mills, for the sum of \$12,000, by a deed containing the covenants expressed by the words 'grant, bargain and sell,' and a general warranty. Afterwards doubts began to be entertained about the validity of the title of Collier to the land conveyed to Gamble, and by Gamble to Mills; and Gamble, on the 16th day of March, 1842, purchased from Luke E. Lawless, who claimed, under the heirs of Ames Stoddard, one undi-

vided fifth of a tract of three hundred and fifty arpens, which entirely covered the land conveyed by Collier to Gamble. In a conflict between the title of Collier and the heirs of Stoddard, the latter prevailed, Collier claiming under a New Madrid location, and Stoddard's heirs under a concession by the Spanish government, confirmed by the act of congress of July 4, 1836. The consideration of the conveyance from Lawless to Gamble was \$1,000 and an assignment of the covenants contained in the deeds of Collier to Gamble, in trust for Virginia Lawless, the plaintiff, and wife of Luke E. Lawless. The title of Collier having been defeated by that of the heirs of Stoddard, Gamble, by means of the one-fifth part of the claim of the said heirs, which he had purchased from Lawless, was enabled to perfect the title to the land he had conveyed to Mills, and by suitable conveyances, between all interested, Mills and those to whom he had conveyed were made secure in the possession of the land they had purchased from Gamble. Neither Mills nor those claiming under him have been actually evicted, nor has Gamble been compelled to pay any damages, by

If the defect in the title is remedied by the grantee he may recover the expense actually incurred and a reasonable com-

reason of any covenants contained in his deed to Mills. On this state of facts, Virginia Lawless, the beneficiary assignee of Gamble, instituted an action for the breach of the covenants of seizin contained in the deed from Collier to Gamble, claiming damages to an amount equal to the purchase-money received by Collier, with interest from the time of payment. The defendant maintained that the plaintiff was only entitled to nominal damages. The court directed the jury that the measure of damages was the sum paid by Gamble to Lawless for the interest he acquired in the claim of Stoddard's heirs, together with interest. There was a verdict accordingly.

"1. As the title under which Collier held the land has been defeated, and as Mills and those claiming under him no longer hold by the title originally obtained from Collier, but by means of the purchase made by Gamble from Lawless of an interest in an adverse title, the rule which limits a recovery in an action on the covenant of seizin to a nominal sum until there has been an eviction has no application under the circumstances of this case. Where the title conveyed has been defeated, and the grantee or his assigns hold by an adverse title to that acquired from their grantor, there can be no necessity for submitting to the form of an eviction, in order to be entitled to a recovery of full damages for a breach of the covenant of seizin. The reason of the rule, as laid down in the case of *Collier v. Gamble*, 10 Mo. Rep. 472, shows that it is inapplicable to the circumstances of this case as now presented. Rawle, speaking on this subject, says: 'Cases may, of course, occur

in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet, when the failure of title is so complete, and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money.' P. 83.

"2. The weight of American authority has determined that the covenant for seizin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But in such case the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other. Rawle, 44.

"3. Under the peculiar circumstances of this case, what is the measure of damages? Can it be said that the purchase-money paid by Gamble to Lawless is the just measure? Was it by the payment of the sum of \$1,000 only that Gamble was enabled to secure the title or possession of his grantee, and thereby prevent a recourse against him on his covenant? Such an assertion is not warranted by the facts. We cannot say that Lawless in making a sale of his land did not regard the covenants of Collier as worth the full sum which they



pensation for his services, but nothing further.<sup>1</sup> He cannot be compelled to pursue equities to which he might be subrogated for the purpose of making himself whole.<sup>2</sup> The vendor cannot offset against the amount paid by the vendee money paid for taxes on the land before it was conveyed.<sup>3</sup>

[270] § 599. **Same subject.** There is something incongruous in allowing, in any case, full damages as for actual loss, and yet requiring a reconveyance. This is so where no title whatever is conveyed; but if some title passes, though so far short [271] of that covenanted for that the grantee is clearly not

were given to secure. He did not convey to Gamble the identical land which Gamble had conveyed to Mills. His conveyance of itself did operate but partially to secure Gamble, and thereby destroy his recourse against Collier for his purchase-money. It was by the acts of Gamble subsequent to Lawless' conveyance that his vendee's title was perfected. What right had Gamble then to adopt a course of conduct which would have impaired the recourse of Lawless' trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless? In so doing he would have injured the plaintiff and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless for the destruction of the right which he had assigned for her benefit? This is the consequence flowing from holding that the \$1,000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrong-doer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those whom he was under obligations to indemnify. Is it not more just that Collier should refund the money

he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another? No one can say that without the assignment of the covenants in Collier's deeds Gamble ever would have been enabled to obtain Lawless' interest in the Stoddard claim. We know not how those covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure.

"4. It was maintained that before there could be a recovery of the entire consideration money received by Collier, there should be a reconveyance of the title derived from him. The want of such reconveyance is no bar to the action. This matter rests in the discretion of the court. Under the circumstances of this case a court would impose no terms to prevent a recovery of the entire consideration money. A reconveyance here would be a nugatory act and totally unavailing for any purpose. Rawle, 84." *Hooper v. Sac Co. Bank*, 72 Iowa, 280.

<sup>1</sup> *Morrison v. Underwood*, 20 N. H. 369.

<sup>2</sup> *Royer v. Foster*, 62 Iowa, 321.

<sup>3</sup> *Hooper v. Sac Co. Bank*, 72 Iowa, 280.

bound to retain it for a proportional part of the purchase-money, on tendering a reconveyance and surrendering possession recovery may be had of the entire consideration [272] and interest, together with taxes paid, less the value of rents received.<sup>1</sup> The grantor in such cases may elect to consider the title as wholly failing.<sup>2</sup> The want of reconveyance is no bar to the action, and a release by the covenantee to a third person is not nor would it on principle affect the right of the covenantee to full damages when no title passed,<sup>3</sup> except where the covenant is held to run with the land.<sup>4</sup> The doctrine laid down in *Bickford v. Page*<sup>5</sup> would seem opposed to any abatement of damages where there had been a sale for a consideration even exceeding the purchase-money paid when the covenant was made. The action was on the covenant of good right to convey. The defendant pleaded that before the plaintiff commenced the action, before he had improved the premises or added any value, he transferred them to T. R. for the consideration of \$100 in fee, without covenants rendering the plaintiff answerable for any defect of title; averring that thereby all the plaintiff's right, title, and interest thereon, and in the covenants, passed to T. R. On demurrer this was held no bar. Parsons, C. J., said: "As the defendant in his bar has not traversed this breach (of the covenant of good right to convey), nor confessed and avoided it, we must consider this covenant as having been broken by him. It must therefore have been broken immediately on the execution of the deed containing it; and the damages accruing from the breach must have been suffered by the plaintiff before his release to T. R. This covenant, having been broken before the release, was at that time a mere *chose in action* not assignable. Neither could it have passed by the release; because no estate passing to the plaintiff by the defendant's deed, there was no land to which this covenant could be annexed so as to pass to the releasee. . . . But he (the plaintiff) is entitled to his [273] damages for the breach of the defendant's covenant that he had a good right to convey. The rule for assessing the dam-

<sup>1</sup> *Frazer v. Supervisors*, 74 Ill. 282.

<sup>4</sup> *Cockrell v. Proctor*, 65 Mo. 41;

<sup>2</sup> *Kincaid v. Brittain*, 5 Sneed, 119;

*Schofield v. Iowa Homestead Co.*, 32

*Recohs v. Younglove*, 8 Baxter, 385. Iowa, 317.

<sup>3</sup> *Cornell v. Jackson*, 3 Cush. 506.

<sup>5</sup> 2 Mass. 455.

ages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the consideration which he paid for it, amounting to 6s. 5d. This he is entitled to recover back with interest to this time."

Whatever the covenantee realizes as a benefit from the conveyance to him will diminish his actual loss. If the title is made good by the statute of limitations, and there has been no actual disturbance or injury, the damages would be merely nominal.<sup>1</sup> Though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring afterwards, even down to the actual assessment of the damages, tending to increase or diminish them, may be given in evidence and considered by the jury.<sup>2</sup> At least nominal damages are allowed for any breach of these covenants when no actual injury is sustained. The law always infers some injury, and awards this minimum of damages for every violation of contract.<sup>3</sup>

§ 600. **Where covenant runs with land.** In *Eaton v. Lyman*<sup>4</sup> there is a forcible protest, in the dissenting opinion of Dixon, C. J., against nominal damages for a mere technical breach of such covenants when they are held to run with the land, and are available to those claiming under the covenantee. He says: "In those courts which hold that covenants of seizin and against incumbrances (for both stand upon the same footing and are regarded as of the same nature by all courts) are purely personal and *de presenti*; and so are complete and perfect, or broken and impaired, as soon as made, the doctrine of nominal breach and nominal recovery is very [274] consistent and proper. Such doctrine necessarily results from the nature of the covenants as held by them, the same being broken as soon as made, and so converted into mere choses in action or rights to sue, in the hands of the covenantee, and so deprived of all capacity to run with the land,

<sup>1</sup> *Smith v. Hughes*, 50 Wis. 620; 41 Conn. 112, 130; *Dickey v. Weston*, Wilson v. Forbes, 2 Dev. 30. 61 N. H. 23.

<sup>2</sup> *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford & S. Ore Co.*, 369; vol. 1, § 9.

<sup>4</sup> 30 Wis. 41.

so as to pass the benefit of them to the grantee of the covenant. In those courts the recovery is reduced to a merely nominal one where there was seizin in fact or in deed of the land in the covenantor, which passed to the covenantee, who has entered and enjoyed according to the deed; and where the breach complained of is merely a paramount title in a stranger, or an outstanding incumbrance that has not yet been either asserted or extinguished. And the reason why in such cases the damages are only nominal is, that if for such breach the covenantee is permitted to recover the consideration and interest, he may get both the purchase-money and retain possession of the land under a title which is defeasible, but which in fact may never be defeated. The entire learning of those courts holding to the *de presenti* nature of the covenants is very concisely exhibited in the numberless citations made in *Morrison v. Underwood*.<sup>1</sup> . . . But this court having in . . . [*Mecklem v. Blake*]<sup>2</sup> . . . as well as others, adopted and declared the rule of interpretation that covenants of seizin and against incumbrances are real and *de futuro*, and not personal and *de presenti*, so that they run with the land and pass the benefits of them to the grantees of the covenant, it follows as clearly and undeniably as one proposition can follow from another, that there can be no nominal breach, or nominal recovery, where the covenantee, or those holding under him, take and retain undisturbed possession of the land without molestation or loss from the paramount outstanding title or incumbrance. This follows necessarily and logically from the premises respecting the nature and operation of the covenants. They are thus placed upon the same footing as other covenants which inhere in and attach to the realty, and run with it until the breach ensues. They belong to the same category or class with the covenants for further assurance of quiet enjoyment and of warranty, which are dependent upon posterior events, and of which there can [275] be no breach until such events happen. Such is the logical sequence of the doctrine we have adopted, and such it will be found are the decisions of those courts in which the same doctrine prevails." Nominal damages are denied in Ohio.<sup>3</sup>

<sup>1</sup> 20 N. H. 369.

<sup>2</sup> 22 Wis. 495.

<sup>3</sup> *Backus v. McCoy*, 3 Ohio, 211;  
*Foote v. Burnett*, 10 id. 318; *Devore*



§ 601. **How damages may be prevented or mitigated.** Between the execution of the deed when these covenants are supposed to be broken, and the assessment of damages, the defect of title which constituted the breach of the covenant of seizin may have been remedied by time or accident, the acts of strangers or of the grantor, without the interference in any way of the grantee or his assignee; as by the death of a tenant for life, the performance of a condition or the like, or by the release or purchase of opposing claims. The grantee at the time damages are assessed may, consequently, have the property and interest for which he contracted free of any defect, and this without trouble or expense to himself; and he would in such case, therefore, be equitably entitled to recover nothing more than nominal damages which are implied by law from every breach of covenant, and which give to the grantee a right of action of which he will not be deprived without some act or neglect of his own.<sup>1</sup> If, after a breach of these covenants, and before action brought to recover damages, the covenantor acquires the paramount title, and, by virtue of other covenants in the deed, that title inures to the covenantee, this fact will go in mitigation of damages, and may reduce them to nominal.<sup>2</sup> A grantor who obtains a good title cannot compel his grantee, after eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed or in mitigation of damages for their breach.<sup>3</sup> It is held in Missouri that equity will compel the acceptance of such title and enjoin the prosecution of a suit for damages;<sup>4</sup> but this is contrary to the rule in New

v. Sunderland, 17 id. 52. See Schofield v. Iowa Homestead Co., 32 Iowa, 317.

<sup>1</sup> Morrison v. Underwood, 20 N. H. 369.

<sup>2</sup> Baxter v. Bradbury, 20 Me. 260; Knowles v. Kennedy, 82 Pa. St. 445; King v. Gilson, 32 Ill. 348; Burke v. Beveridge, 15 Minn. 205; Kimball v. Bryant, 25 Minn. 496, 500; McCarty v. Leggett, 3 Hill, 134; Noonan v. Ilsley, 21 Wis. 138; Ogden v. Ball, 38 Minn. 237; Smith v. Hughes, 50 Wis. 620; Huntsman v. Hendricks, 44

Minn. 423. See Blanchard v. Ellis, 1 Gray, 193; Burton v. Reeds, 20 Ind. 87; Bingham v. Weiderwax, 1 N. Y. 509; Tucker v. Clark, 2 Sandf. Ch. 96; Boulter v. Hamilton, 15 Up. Can. C. P. 125; Doedwine v. Webster, 2 Up. Can. Q. B. 224; Cornell v. Jackson, 3 Cush. 506.

<sup>3</sup> Nichol v. Alexander, 28 Wis. 118; McInnis v. Lyman, 62 id. 191; Blanchard v. Ellis, 1 Gray, 199; Bingham v. Weiderwax, 1 N. Y. 513; Burton v. Reeds, 20 Ind. 93.

<sup>4</sup> Reese v. Smith, 12 Mo. 344.

York.<sup>1</sup> The rule is established in Indiana that the grantor cannot claim a set-off on account of the *mesne* profits enjoyed by the grantee,<sup>2</sup> though the true owner fails in his action to evict to obtain a judgment for them.<sup>3</sup> The covenantee cannot recover interest if he has had possession and has not responded to his evictor for *mesne* profits, and then only for such time as he shall have accounted for them.<sup>4</sup> The rule is that for a total breach the measure of damages is the consideration and interest; and that for a mere technical breach a nominal sum only can be recovered. Between these extremes the recovery may be proportionate to the actual injury; this is the [276] invariable criterion and measure.<sup>5</sup> Thus, where the covenant was of a seizin in fee, and the estate possessed and conveyed was copyhold, the covenant was broken, and the covenantee was held entitled to damages according to the difference in value between a fee-simple and a copyhold estate.<sup>6</sup> So where a fee-simple has been covenanted for and the title conveyed was subject to a life estate, the value of the latter is recoverable,<sup>7</sup> and may be computed from life tables.<sup>8</sup>

§ 602. **Same subject.** Where a deed of the entirety in fee was made with covenants of seizin, power to sell and of warranty, and the grantors owned only an undivided two-sixths and a life estate in the other four-sixths, the plaintiff was held entitled to recover damages in an action for breach of the former covenants only in proportion to the value of the part for which the title had failed; that is, four-sixths of the consideration money and interest; but, as the life estate of the defendants in the four-sixths passed to the plaintiff by the deed, the value of such life estate must be deducted; nor was interest to be allowed during the life of the defendants, as,

<sup>1</sup> Tucker v. Clarke, 2 Sandf. Ch. 96.

<sup>6</sup> Gray v. Briscoe, Noy, 142.

<sup>2</sup> Wilson v. Peelle, 78 Ind. 384;  
Wright v. Nipple, 92 id. 310.

<sup>7</sup> Guthrie v. Pugsley, 12 Johns. 126;  
Tanner v. Livingston, 12 Wend. 83;  
Lockwood v. Sturdevant, 6 Conn.

<sup>3</sup> Rhea v. Swain, 122 Ind. 272.

373; Recoys v. Younglove, 8 Baxter, 385. See Blanchard v. Blanchard, 48 Me. 174; Rickert v. Snyder, 9 Wend. 416.

<sup>4</sup> Hutchins v. Roundtree, 77 Mo. 500.

<sup>5</sup> Herndon v. Harrison, 34 Miss. 486; Nutting v. Herbert, 37 N. H. 346; Miller v. Hartford & S. Ore Co., 41 Conn. 130; Whiting v. Dewey, 15 Pick. 438.

<sup>8</sup> Mills v. Catlin, 22 Vt. 98; Donaldson v. M. & M. R. Co., 18 Iowa, 280.

during that time, the plaintiff could not be called on for *mesne* profits.<sup>1</sup> If A. conveys land to B., with covenant of seizin, and the title to part only of the land fails, the sale will not be rescinded by a recovery at law so as to give the vendee a right of action to recover the whole consideration money; but the plaintiff is only entitled to recover in proportion to the extent of the defect of title, or the value of the part lost. The measure of damages is the value of the part to which the title has failed, with reference to the value of the [277] residue. In a New York case<sup>2</sup> Kent, C. J., said: "Another question is, whether the defendant ought not to have been permitted to show that the lands in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for \$10,000; and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land; would it not be unjust that the grantor should be limited in damages under his covenants to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated, and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice if he was obliged to refund nine-tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. . . . The recovery in value upon the warranty at common law was regulated by the same rule. The *capias ad valentiam* was issued to take as much land of the warrantor as was equal to the value of the lands lost. *Cape de terra in balliva tua ad valentiam tantæ terræ quod B. clamat ut jus suum*; and if the lands of the warrantor lay in another county, different from that in which the lands in controversy

<sup>1</sup> *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 851; *Guthrie v. Pugsley*, 12 Johns. 126; *Ela v.* Card, 2 N. H. 175; *Downer v. Smith*, 38 Vt. 464.  
<sup>2</sup> *Morris v. Phelps*, 5 Johns. 49.

lay, then the lands in question were first appraised by a sheriff's inquest, and afterwards the writ went to the sheriff of the other county to take lands of equal value, which value was specified in the writ.<sup>1</sup> If the recovery in the present case had been of an undivided part of all the lands conveyed by the deed, then the rule of apportionment of damages according to the relative value could not have applied, and this distinction runs through the authorities on the subject. But the plaintiff's title failed only to an undivided part of a specified tract, and remained good to another and larger tract conveyed by the same deed, and included in the same consideration. The apportionment, according to the relative value, is therefore strictly and justly applicable."<sup>2</sup> The prevailing rule is clearly expressed by Cassoday, J., in a Wisconsin case: "In the absence of fraud, we conclude that where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years."<sup>3</sup> Where there is a failure of title to a part and the paramount title is extinguished by the grantee the measure of damages is the amount paid if it does not exceed the value of that part as found by the jury. If it does exceed it, the jury are to be guided, not by the quantity of land, but by the value that such part proportionately bears to the value of the whole tract as estimated by the

<sup>1</sup> Bracton, 384, a, b.

<sup>2</sup> *Clapp v. Herdman*, 25 Ill. App. 509; *Hunt v. Raplee*, 44 Hun, 149; *Moses v. Wallace*, 7 Lea (Tenn.), 413; *Blanchard v. Hoxie*, 34 Me. 376; *Hubbard v. Norton*, 10 Conn. 422; *Partridge v. Hatch*, 18 N. H. 494; *Cornell v. Jackson*, 3 Cush. 506. See, as to the rule in Indiana, *Wright v. Nipple*, 92 Ind. 310; *Wilson v. Peelle*, 78 id. 384; *Wood v. Bibbins*, 58 id. 392. Compare *American Cannel Coal Co. v. Seitz*, 101 id. 182.

<sup>3</sup> *Semple v. Whorton*, 68 Wis. 626.

In this case Taylor, J., expressed, in a dissenting opinion, the conviction that the rule stated is merely a general one, applicable to ordinary cases, and should not be applied where the part to which the title fails is of more value than any of the other parts of the tract purchased by reason of facts which neither of the parties knew at the time of the bargain, and which, therefore, had no influence in fixing the price.



consideration in the deed.<sup>1</sup> A peculiar case has recently been decided by the Maine court. The defendant held a mortgage as security for the mortgagor's note. The latter arranged with the plaintiff to furnish him money on a new mortgage to discharge that held by the defendant. In lieu of such mortgage the defendant assigned his mortgage to plaintiff as security for the mortgagor's note. In the assignment there was a covenant that there was no incumbrance on the mortgage and that the assignor had a right to sell and convey. Some years before the mortgagee had released a portion of the mortgaged premises to the mortgagor, a fact which was not in his recollection when the assignment was made. At the date of the transaction between the parties to this action the mortgage covered property worth more by several hundreds of dollars than the amount advanced by plaintiff; between then and the time of the foreclosure it depreciated so as to leave a considerable sum due on the note. It was held in an action on defendant's covenant that he was liable only for nominal damages.<sup>2</sup>

#### SECTION 4.

##### COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT.

[279] § 603. **Their scope.** These covenants are usually treated as synonymous, since a concurrence of the same circumstances is necessary to constitute a breach, since they equally possess the capacity to run with the land, and the rule in respect to the measure of damages is the same as to both.<sup>3</sup> They are assurances to the purchaser and his assigns against a future loss of title to and possession of the granted premises; in other words, their meaning is that neither the grantee nor his heirs or assigns shall be deprived of the possession by force of a paramount title.<sup>4</sup>

<sup>1</sup> Price v. Deal, 90 N. C. 290.

<sup>2</sup> People's Savings Bank v. Hill, 81 Me. 71 (1888).

<sup>3</sup> Bostwick v. Williams, 36 Ill. 65; Rea v. Minkler, 5 Lans. 196; Fowler v. Poling, 2 Barb. 300; S. C., 6 id.

165; Mitchell v. Warner, 5 Conn. 497; Herrin v. McEntyre, 1 Hawks, 410; Rawle on Cov. Tit. 208, 215.

<sup>4</sup> Rindskopf v. Farmers' L. & T. Co., 58 Barb. 36; King v. Kerr, 5 Ohio, 154.

§ 604. **What is a breach.** These covenants are only broken by an eviction or something equivalent thereto.<sup>1</sup> Formerly they were not broken unless there was an expulsion by the assertion of a paramount title and by process of law. The rule now is that there is a breach whenever there is an involuntary loss of possession by reason of the hostile assertion of an irresistible title. The eviction may be constructive, as where the purchaser is unable to obtain possession by reason of the paramount title being in a third person.<sup>2</sup> If possession is yielded to such person the vendee assumes the risk of showing his right thereto.<sup>3</sup> The eviction must be alleged and shown to be by a paramount title existing before or at [280] the time the defendant made his covenant.<sup>4</sup> Where the

<sup>1</sup> *Id.*; *Bostwick v. Williams*, 36 Ill. 65; *Owen v. Thomas*, 33 id. 320; *Giddings v. Canfield*, 4 Conn. 482; *McGary v. Hastings*, 39 Cal. 360; *Woodward v. Allan*, 3 Dana. 164; *Rickets v. Dickens*, 1 Murph. 343; *Norton v. Jackson*, 5 Cal. 262; *Booker v. Merriweather*, 4 Litt. 212; *Rickert v. Snyder*, 9 Wend. 416; *Innes v. Agnew*, 1 Ohio, 179; *Post v. Campau*, 42 Mich. 90; *Davis v. Smith*, 5 Ga. 274; *Hannah v. Henderson*, 4 Ind. 174; *Woodford v. Leavenworth*, 14 id. 311; *Simpson v. Hawkins*, 1 Dana, 303; *Stewart v. Drake*, 9 N. J. L. 139; *Sisk v. Woodruff*, 15 Ill. 15; *Crutcher v. Stamp*, 5 Hayw. 100; *Meek v. Bear-den*, 5 Yerg. 467; *Gilman v. Haven*, 11 Cush. 330; *Park v. Bates*, 12 Vt. 381; *Noonan v. Lee*, 2 Black, 499; *Swazey v. Brooks*, 34 Vt. 451; *Knapp v. Marlboro*, id. 234; *Evans v. Lewis*, 5 Har. 162; *Stewart v. West*, 14 Pa. St. 336; *Patton v. McFarlane*, 3 Penn. 419; *Fulweiler v. Baugher*, 15 S. & R. 45; *Knepper v. Kurtz*, 58 Pa. St. 480; *Clark v. McNulty*, 3 S. & R. 364; *McCoy v. Lord*, 19 Barb. 18; *Green-vault v. Davis*, 4 Hill, 643; *Hamilton v. Cutts*, 4 Mass. 349; *Curtis v. Deering*, 12 Me. 499; *Mitchell v. Warner*, 5 Conn. 497; *Witty v. Hightower*, 12

S. & M. 478; *Carter v. Denman*, 23 N. J. L. 260; *Tufts v. Adams*, 8 Pick. 547; *Flanagan v. Ward*, 12 Tex. 209; *Peck v. Hensley*, 20 id. 673.

<sup>2</sup> *Fritz v. Pusey*, 31 Minn. 368; *Murphy v. Price*, 48 Mo. 247; *Clark v. Conroe's Estate*, 38 Vt. 469; *Russ v. Steele*, 40 id. 310; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313; *Duvall v. Craig*, 2 Wheat. 62.

<sup>3</sup> *Lambert v. Estes*, 99 Mo. 604; *Clark v. Munford*, 62 Texas, 531.

<sup>4</sup> Cases cited in first note to this section; *Wade v. Comstock*, 11 Ohio St. 71. In *Knapp v. Marlboro*, 34 Vt. 451, the plaintiff and his grantors had been in possession of the premises in controversy for more than half a century, and then he was evicted by a third person; it was held, in an action against his covenantor, that such long continued possession raised a conclusive presumption that he was not evicted by title paramount.

In *Woodward v. Allan*, 3 Dana, 164, while the necessity of eviction by a paramount title is admitted, it is held that an allegation that the eviction was by an adverse superior title was sufficient, and that it need not be averred to be an older title if

grantor had title at law and in equity to the land conveyed, and the breach assigned was the making of a subsequent conveyance which, by being first recorded, enabled the grantee under the registry laws to hold the land, the court held that "the covenant of warranty relates solely to the title as it was at the time the conveyance was made; that it merely binds the grantor to protect the grantee and his assigns against a lawful and better title existing before or at the date of the grant;" and that an action would not lie on a general covenant of warranty in such a case.<sup>1</sup> The decisions are not entirely in accord as to what shall be deemed an eviction for the purpose of recovery on these covenants; but an eviction, or what is deemed equivalent, by paramount title is essential to the right to damages and is universally required.

§ 605. **The rule of damages; remote losses.** The measure of compensation is not the same in all the states. In a majority the consideration, or the value of the land at the time of the sale as then agreed upon by the parties, or as determined by the price paid, with interest for such time as the purchaser has been deprived of, or is accountable to the superior owner for, the *mesne* profits, together with the costs and expenses incurred in defense of the action by which the injured party was evicted, is the measure for a total failure of title.<sup>2</sup> This measure of damages does not harmonize with

stated to be adverse and not derived from the plaintiff himself. See *Pence v. Duvall*, 9 B. Mon. 48; *Curtis v. Deering*, 12 Me. 499; *Staples v. Flint*, 28 Vt. 794; *Lukens v. Nicholson*, 4 Phila. (Pa.) 22; *Maeder v. Carondelet*, 26 Mo. 112; *Scott v. Scott*, 70 Pa. St. 244.

<sup>1</sup> *Wade v. Comstock*, 11 Ohio St. 71. But compare *Curtis v. Deering*, *supra*; *Maeder v. Carondelet*, 26 Mo. 114.

<sup>2</sup> *Kingsbury v. Milner*, 69 Ala. 502; *Click v. Green*, 77 Va. 827; *Sheffey's Ex'r v. Gardiner*, 79 id. 313; *Moreland v. Metz*, 24 W. Va. 119, 138; *Butcher v. Peterson*, 26 id. 447; *Cook v. Curtis*, 68 Mich. 611; *Lambert v. Estes*, 99 Mo. 604; *Stebbins v. Wolf*,

33 Kan. 765; *Hoffman v. Bosch*, 18 Nev. 360; *Brown v. Dickerson*, 12 Pa. St. 372; *Cox v. Henry*, 32 id. 18; *Wood v. Kingston Coal Co.*, 48 Ill. 356; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Dalton v. Bowker*, 8 Nev. 190; *Talbot v. Bedford*, *Cooke* (Tenn.), 447; *Threlkeld v. Fitzhugh*, 2 Leigh, 451; *Jackson v. Turner*, 5 id. 127; *Lowther v. Commonwealth*, 1 Hen. & Mun. 202; *Crenshaw v. Smith*, 5 Munf. 415; *Stout v. Jackson*, 2 Rand. 132; *Williamson v. Test*, 24 Iowa, 138; *Hallum v. Todhunter*, id. 166; *Earle v. Middleton*, 1 Cheves, 127; *Armstrong v. Percy*, 5 Wend. 535; *Bond v. Quattlebaum*, 1 McCord, 584; *McMillan v. Ritchie*, 3 T. B. Mon. 348; *Morris v. Rowan*, 17 N.

the rule which is applied in other cases, nor conform to the principle that a party injured by the breach of a contract shall receive compensation to such an amount as will place him in as good condition as if the contract had been performed. It is founded on the same considerations of justice and policy as that for breach of the covenants of seizin and good right to convey. It is not, however, as logical as in case of the latter; for there the damages are fixed by the value at the time of the breach, and the consideration paid is adopted as the value fixed by the parties. In an early case in Virginia it was said: "The measure of damages is and ought to be the same in case of eviction, whether they be claimed in an action upon a warranty, or covenant of seizin or of power to convey, or [282] for quiet enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements, and the rents and profits for which the tenant is responsible to the successful owner."<sup>1</sup> The law of the jurisdiction in which the property is situated determines the measure of damages.<sup>2</sup> There cannot be a recovery for losses resulting to the purchaser from breaking up his business and preparing to move

- J. L. 304; *Hanson v. Buckner*, 4 Dana, 251; *Kennedy v. Davis*, 7 T. B. Mon. 376; *Taylor v. Holter*, 1 Mont. 688; *Cox's Heirs v. Strode*, 2 Bibb, 277; *Drew v. Towle*, 30 N. H. 531; *Harding v. Larkin*, 41 Ill. 413; *Booker v. Bill*, 3 Bibb, 173; *Robards v. Netherland*, id. 529; *Davis v. Hall*, 2 id. 590; *Marshall v. McConnell*, 1 Litt. 419; *Cummins v. Kennedy*, 3 id. 118; *Pence v. Duvall*, 9 B. Mon. 48; *Robertson v. Lemon*, 2 Bush, 301; *McClure v. Gamble*, 27 Pa. St. 288; *McGary v. Hastings*, 39 Cal. 360; *Davis v. Smith*, 5 Ga. 274; *Phillips v. Reichart*, 17 Ind. 120; *Burton v. Reeds*, 20 id. 87; *Cincinnati, etc. R. Co. v. Pearce*, 28 Ind. 502; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck*, 3 Cai. 111; *Bennett v. Jenkins*, 13 Johns. 50; *Wallace v. Talbot*, 1 McCord, 466; *Grist v. Hodges*, 3 Dev. L. 198; *Lloyd v. Quinby*, 5 Ohio St. 262; *Wade v. Comstock*, 11 id. 71; *Tong v. Matthews*, 23 Mo. 437; *Swafford v. Whipple*, 3 G. Greene, 261; *Pearson v. Davis*, 1 McMull. 37; *Elliot v. Thompson*, 4 Humph. 99; *Gridley v. Tucker*, Freem. Ch. 209; *Clark v. Burr*, 14 Ohio, 118; *Whitlock v. Crew*, 28 Ga. 289; *Cathcart v. Bowman*, 5 Pa. St. 317; *Conrad v. Trustees Grand Grove, etc.*, 64 Wis. 258.
- On the breach of the covenant of warranty and an eviction, substantial damages are recoverable. *Comstock v. Son*, 154 Mass. 389.
- <sup>1</sup> *Stout v. Jackson*, 2 Rand. 132. See Rawle on Cov. (5th ed.), § 164.
- <sup>2</sup> *Tillotson v. Prichard*, 60 Vt. 94.



upon the land purchased;<sup>1</sup> nor for the expense of removal therefrom after eviction when he buys with knowledge of the existence of a paramount title which he might have extinguished by the expenditure of a less sum than that owing on the purchase price.<sup>2</sup> Where the conveyance was made in good faith by the actual owner in possession, subject to a mortgage, but in consequence of the failure of the record to show a deed in his chain of title the grantee was unable to borrow money on the land, and in consequence was evicted by a foreclosure of the mortgage, the grantor was not liable for the loss of the land, that being a consequence too remote, he having subsequently procured a deed to supply the missing link in his chain of title.<sup>3</sup>

§ 606. **Where property is the consideration.** If the amount of the consideration is not expressly agreed upon and has been paid in property, it would follow that the value of that property should be adopted as the basis of damages on a breach of the covenant of warranty, if the consideration paid is adopted as the criterion, as we have seen is the case in assessing damages for breach of the covenant of seizin and power to convey;<sup>4</sup> but in some cases the value of the land to which the covenant refers is adopted as the standard. And it has been made a question whether the value for this purpose shall be ascertained at the date of the grant and covenant, or at some earlier date when the contract of sale may have been made. By some of the early cases in Kentucky a very rigid rule was laid down, making the value of the land lost, estimated at the date of the grant, the basis of recovery, though contracted to be conveyed at a much earlier time. If the consideration was stated in the deed that was conclusive;<sup>5</sup> not because it was the measure of damages, but because it was the value of the granted land fixed by the parties.<sup>6</sup> In one case a bond was accepted in 1784, conditioned to convey five hundred acres of land as soon as a patent should issue; it contained also a provision for the conveyance of other land, equal in value, if that should be lost. It was held

<sup>1</sup> *Gunter v. Beard*, 93 Ala. 227.

*Humes*, 85 Tenn. 26; *Cook v. Curtis*, 68 Mich. 611.

<sup>2</sup> *Id.*

<sup>3</sup> *Lamb v. Buker*, 52 N. W. Rep. 285 (Neb.).

<sup>5</sup> *McMillan v. Ritchie*, 3 T. B. Mon. 348.

<sup>4</sup> See *ante*, § 575; *McGuffey v.*

<sup>6</sup> *Marshall v. McConnell*, 1 Litt. 419.

that the object of the bond was to provide for the contingency of the land being lost before a deed of conveyance should be executed, and did not extend to an eviction after the execution of a deed of conveyance with general warranty. In this case there was a breach of the condition of the bond by failing to execute a deed of conveyance; suit was brought, [283] and in 1805 a compromise made, and a deed with general warranty executed. The value of the land in 1805, when the deed was executed, and not in 1784 with interest, was held to be the measure of damages. The consideration paid was evidence of its value. The deed was deemed to have been received in satisfaction of the bond by the compromise, and to have extinguished all right to proceed upon the bond. The court said: "In deciding upon the amount which should be recovered . . . we must look to the covenants of warranty contained in the deeds of conveyance. It would no doubt have been competent for the parties when the deeds were executed, by a clause to that effect, to have referred to the condition of the bond, and, by adopting it as part of the covenant of warranty contained in the deeds, made the stipulations in that condition control the recovery on the covenant of warranty. But this they have not done. . . . The amount to be recovered . . . must be regulated by the value of the land at the date of the deeds, and not by the value when the bond was executed; . . . for it is incontrovertibly settled, by repeated decisions of this court, that the value of the land at the date of the covenant of warranty forms the criterion of damages to be recovered for a breach of the covenant. We know it has been said, and no doubt said correctly, that the consideration given for lands forms a proper inquiry in actions founded on a breach of the covenant of warranty. It is not, however, because the consideration in itself constitutes the measure of damages that it is inquired into; but it is resorted to as a means to ascertain the value of the land. The value of the land at the date of the warranty with interest forms the measure of damages, and the consideration given for the land constitutes evidence of that value; and where the amount of the consideration is definite and certain, it forms evidence of a very persuasive and satisfactory character of the true value. It ought, perhaps, in such a case

to be conclusive on the parties; for as it shows the value which the parties themselves put on the land, if they should be concluded by it, they can have no cause to complain. But where the consideration is not of that fixed and certain character, and consists, as in the present case, in the compromise of a contest between the parties, it can form no rational means of [284] ascertaining the value of the land. The amount of that consideration is itself uncertain; it cannot be defined by any precise rule, and forms no inquiry in ascertaining the value of the land; but the value of the land must, in such a case, be ascertained by the introduction of other evidence."<sup>1</sup> But in a later case it was held, on a breach of the covenant of warranty, that restitution to the extent of the failure of consideration is the fixed and only stable and consistent rule; that the true criterion is not the value of the land at the time of the eviction, but the amount received for the lost land and all costs incurred in resisting the eviction.<sup>2</sup> It is believed that the general rule

<sup>1</sup> In *Cummins v. Kennedy*, 3 Litt. 118, the court said: "The general rule, settled by a current of authorities, is, that as the conveyance completes the sale, the value of the land conveyed, at the date of the conveyance, with interest and costs, forms the criterion of damages; and also that the price stipulated is the best evidence of that value. And where the parties have shown that price in the conveyance, it would not perhaps be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid a long time before the date of the deed, still, if it is expressed, it would fix the criterion, though the land, when conveyed, had greatly risen in value. In this case, however, the parties have shown what constituted the consideration; but still, its then value is uncertain, because it consisted in land, the price of which was not fixed. It is not necessary now to say that in every case, parties, where the deed did not fix the price, should be con-

fined to its date, and could, in no case, travel back and show that the consideration had passed long before, and of course was of less value; for in this case there are circumstances which show that the warranty ought to be measured by the general rule, notwithstanding the contract was made in 1783 with the testator of the defendant." *Marshall v. McConnell*, 1 Litt. 419.

In *Pence v. Duvall*, 9 B. Mon. 48, Judge Breck said: "The criterion of damages in a case of this kind is the value of the land at the time of the sale and interest; and the best evidence of that value is held to be the price given, or the purchase-money — not the amount actually paid at the time, but the amount secured or stipulated to be paid. We do not perceive any principle upon which the failure of the grantee to pay the stipulated price can absolve the grantor from his covenants."

<sup>2</sup> *Robertson v. Lemon*, 2 Bush, 301.

is to make the consideration paid the basis of recovery, and if that is paid in property at an agreed value, the value so agreed upon is taken as the actual value.<sup>1</sup>

**§ 607. Rule of damages in England and Canada.** In [285] England and her Canadian provinces the consideration does not appear to be fixed as the measure of recovery. In *Bunny v. Hopkins*<sup>2</sup> a sale of building lots was made, with covenants for title, to one who erected buildings thereon and sold them. His purchaser was evicted from a part at the suit of a grantee under a prior deed from the covenantor. This covenantor having died, the evicted party was permitted to claim as a specialty creditor the value of the property, including improvements. The master of the rolls said: "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."<sup>3</sup> "Where the plaintiff, who

<sup>1</sup>In *Koestenbader v. Pierce*, 41 Iowa, 204, the breach consisted of a previous condemnation of a strip of land granted for the use of a railroad. Day, J., said: "When the parties have by their agreement fixed the value of the premises without the incumbrance, the sum so fixed is to be regarded as such value, and must be made the basis of estimating the value with the incumbrance. This rule is just to both parties. In an action on a covenant of warranty the grantee is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken. *Funk v. Cresswell*, 5 Iowa, 62. Suppose, for illustration, the land in question to have been sold for \$1,500, and that in fact, at the time of sale, it was worth unincumbered only \$1,000, and that the incumbrance depreciates its value \$500. Then, if the actual value of the land at the time of sale, incumbered and unincumbered, is to be made the basis of damages, the grantee could recover only one-third of the consideration paid, although the land

is depreciated in value one-half. This does not place him in the condition he would have occupied if no incumbrance existed. Upon the other hand, suppose the price paid is \$1,000, and that the actual value of the land unincumbered is \$1,500, and the value as incumbered is but \$500, making the depreciation \$1,000. Then, upon the basis of the actual incumbered and unincumbered value, the grantee would recover the whole consideration paid, and he would have the land for nothing. The true rule is this: If the land is worth \$1,500 without incumbrance, and \$1,000 with it, it is damaged to the extent of a third of its value, and if sold for \$1,000 the purchaser is damaged \$333 $\frac{1}{3}$ ." *Cook v. Curtis*, 68 Mich. 611; *McGuffey v. Humes*, 85 Tenn. 26.

<sup>2</sup>27 Beav. 565.

<sup>3</sup>In *Hodgins v. Hodgins*, 13 Up. Can. C. P. 146, the plaintiff's father, by indenture of bargain and sale, conveyed to him certain land, the dower of the grantor's wife, the plaintiff's stepmother, not being barred in the deed, whereby he (the



was the lessee of a term, was evicted, it was held that in actions on the covenant for title or quiet enjoyment the meas-

grantor) covenanted for quiet enjoyment in consideration, among other things, of five shillings. Upon the grantor's death his widow brought an action for dower against the grantee and recovered judgment, and this action was brought by the covenantee against the grantor's executors for breach of the covenant for quiet enjoyment. Upon a special case it was held that the measure of damages in an action founded on a breach of a covenant for quiet enjoyment was not to be governed by the consideration money in the deed of conveyance, and therefore that the plaintiff was entitled to substantial damages, and was entitled to the value of the crops lost by reason of the eviction. But because the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff and of the defense of the same were disallowed. Draper, C. J., in the course of his opinion said: "The widow of the testator brought an action of dower against the now plaintiff, who was testator's son by a former wife, and recovered judgment. He defended the action. The damages he claims now consist of the following items:

	£	s.	d.
The demandant's costs, etc., in her action of dower..	24	2	0
The now plaintiff's costs of defending that action	10	7	1
The value of plaintiff's growing crops upon the portion of land assigned by metes and bounds to demandant.....	27	10	0
The value of the life interest of the demandant in the land purchased by plaintiff.....	100	0	0

"The court is to decide what part, if any, of the above sums should be disallowed. It further appeared that the consideration mentioned to have been paid by the plaintiff to the testator in the deed containing the covenants sued on was only 5s., and the court is called upon also to determine whether this affects, and if so to what extent, the plaintiff's right to recover and to reduce the verdict accordingly. So far as I can gather from the English decisions, and they are not numerous, the consideration actually paid or expressed in the deed does not affect the amount of damages recoverable in an action for breach of covenant for quiet enjoyment; and upon the principle of some of the cases to which I refer to below I think it clear that the plaintiff has a right to recover for the crops he has lost and the price he has had to pay to secure quiet enjoyment for the future of all the land which the testator conveyed to him. These damages have been ascertained.

"No consideration was proved except what appeared on the face of the deed, which, according to the pleadings, appears to be 'in consideration, among other things, of five shillings.' This is obviously a merely nominal consideration, and consequently cannot be treated as the price agreed upon between the vendor and vendee as the actual value of the land. The foundation, therefore, of the alleged rule recognized or established in the case of *McKinnon v. Burrows*, 3 Up. Can. Q. B. (old series), 590, is wanting. When it is shown that the grantor was father to the grantee, . . . we may fairly assume that the true consideration was natural love and affection, coupled

ure of damage was the value of the unexpired part of the term, and the amount of damage recovered against the plaintiff by the ejector as *mesne* profits, without interest.<sup>1</sup> And where an action is brought against the occupier by a person

probably with a desire to provide at once for the child of his first wife. Suppose such a consideration to have been expressed without even a nominal money consideration, with full covenants for title, and the vendor's own title to have proved defective, the plaintiff would either have been entitled to the indemnity now sought as to the dower or the covenants would be wholly nugatory. The plaintiff's cause of action does not arise from a latent defect in the vendor's title which existed when he acquired it. The right of dower was, at the date of the conveyance to the plaintiff, only inchoate, and springs from the vendor's own act against which he expressly covenants. The action is upon the covenant for quiet enjoyment, which differs from that of title. The latter is broken as soon as entered into, and the damages for that breach are, not without sufficient reason, referred to the time of the breach. Hence, the purchase-money and interest thereon have been held to form the true measure of damages, and the value of the improvements made by the purchaser have been generally excluded from consideration. In this case there was no breach until the vendor died; for till then the right of dower was not consummated. If the time of the breach is to be referred to as affecting the measure of damages, then the plaintiff is entitled to the amount by which the value of the estate granted is diminished, which amount may be given him without conflicting with the decisions that he shall not recover for improvements made by himself before the breach. None of those decisions, I

believe, was in a case where the eviction was made by a dowress, deriving her right from the vendors, and as the authorities seem to establish that she has a right to be endowed of the value at the death of her husband, there would be some ground for a distinction as to the amount of damages recoverable in such a case by the husband's vendee for the eviction and for taking into account the value of his improvements; but it is not necessary to decide this question, as the parties have not raised it." After citing and stating the doctrine laid down in *Bunny v. Hopkins*, the learned judge continues: "Here the plaintiff seeks only an amount which will satisfy him for not obtaining what the testator covenanted to give him, viz., uninterrupted quiet enjoyment. He asks satisfaction for a partial and temporary interruption. If the vendor had covenanted that in the event of his wife surviving him a sum equal to the value of her dower should be paid the plaintiff as an indemnity, the plaintiff's right to that sum could not have been questioned. Looking at all the circumstances of the present case, I think the covenant for quiet enjoyment entitles the plaintiff to a similar indemnity, and that the sum paid to compromise the widow's claim and the value of the crops lost by the plaintiff should be allowed to him." Compare *Empire Gold Mining Co. v. Jones*, 19 Up. Can. C. P. 245, 257; *Platt v. Grand Trunk R. Co.*, 12 Ont. 119.

<sup>1</sup> "Williams v. Burrell, 1 C. B. 402.

"So, where a lessor, being tenant for life, with power to grant leases in possession, granted to a lessee in pos-

with superior title, and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid and his costs as between attorney and client, even though he gives the covenantor no notice of his intention to compromise. The only effect of want of notice is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given him."<sup>1</sup>

§ 608. Rule of damages in some of the older states. [286] It is not surprising that in a country where the value of real estate fluctuates very little, and is seldom suddenly increased by expensive improvements, that damages for breach [287] of these covenants should be measured by the value of the land at the time of the loss by failure of title and eviction. This rule obtained an early and firm footing in New England, and was for a time in some degree recognized in the early [288] days of other older states.<sup>2</sup> In Maine,<sup>3</sup> Vermont,<sup>4</sup> Massachusetts,<sup>5</sup> and Connecticut,<sup>6</sup> it has been adhered to. In

session a reversionary lease, which, on the lessor's death, reversioner refused to ratify, the lessee recovered from the lessor's executor the premium which he had paid to the lessor, and the difference in value between the term professed to be granted by the lessor and that ultimately granted by the reversioner, together with the excess of the costs of the second lease over that of the void lease. *Lock v. Furze*, 19 C. B. (N. S.) 96, affirmed L. R. 1 C. P. 441; *Jenkins v. Jones*, 9 Q. B. Div. 128; *Henty v. Wray*, 19 Ch. Div. 492, reversed on another point, 21 Ch. Div. 332."

<sup>1</sup> *Mayne on Dam.* (4th Eng. ed.) 198; *Smith v. Compton*, 3 B. & Ad. 407; *Rolph v. Crouch*, L. R. 3 Exch. 44.

<sup>2</sup> *Liber v. Parsons*, 1 Bay, 19; *Guerard v. Rivers*, id. 265; *Eveleigh v. Stitt*, id. 92; *Witherspoon v. McCalla*,

3 Desaus. 245; *Nelson v. Matthews*, 2 Hen. & Munf. 164; *Mills v. Bell*, 3 Call, 277. The rule in South Carolina was changed by *Furman v. Elmore*, 2 N. & McC. 189; and in Virginia by *Threlkeld v. Fitzhugh*, 2 Leigh, 451.

<sup>3</sup> *Cushman v. Blanchard*, 2 Me. 268; *Swett v. Patrick*, 12 id. 9; *Hardy v. Nelson*, 27 id. 525; *Elder v. True*, 30 id. 104; *Doherty v. Dolan*, 65 id. 37; *Williamson v. Williamson*, 71 id. 442.

<sup>4</sup> *Drury v. Shumway*, D. Chip. 111; *Park v. Bates*, 12 Vt. 381; *Keith v. Day*, 15 id. 660; *Keeler v. Wood*, 30 id. 242.

<sup>5</sup> *Gore v. Brazier*, 3 Mass. 523; *Caswell v. Wendell*, 4 id. 108; *Bigelow v. Jones*, id. 512; *Norton v. Babcock*, 2 Met. 516; *White v. Whitney*, 3 id. 81. See *Sumner v. Williams*, 8 Mass. 221.

See next section for some limitations to the rule.

<sup>6</sup> *Beecher v. Baldwin*, 55 Conn. 419;

Massachusetts no exception is made to the liability for improvements because, prior to their completion, a bill in equity had been brought to restrain the grantee from making them. He may rely upon the warranty and will be protected if he proceeds in good faith.<sup>1</sup> The rule also prevails in Louisiana, but will not be applied to improvements made after the vendee has notice of a suit begun by the owner of the paramount title unless they added to the value of the land or benefited the warrantor.<sup>2</sup> In the newer portions of this country the value of real estate rapidly advances with a general or local increase of population; and such increase has been steady and widespread. The regions thus occupied are dotted with cities and villages, built where but lately land was worth little more than government price. A parcel of land sold for five hundred dollars has not unfrequently been so built upon, and so surrounded with improvements, that before an adverse title would be barred by the statute of limitations it has been worth a million of dollars. If the purchaser is evicted by a paramount title, it seems unjust that he should have a legal demand against the vendor who received the five hundred dollars to make good the loss. The parties had equal means of learning the actual state of the title. The sudden increase of value was not in the contemplation of the vendor. So far as it was the result of improvements, he did not consciously become a guarantor. The party making them proceeded on his own judgment, and with a view to his own advantage, with equal knowledge of the title. The rule of damages generally adopted is a reasonable limitation of the vendor's responsibility, and equalizes and apportions between the parties, according to their respective interests, the hazard of loss from failure of title.<sup>3</sup>

§ 609. **Rule in case of partial breach.** For a partial breach damages will be assessed *pro tanto*, according to the recognized standard for a total breach. Thus, for example, [289]

Horsford v. Wright, Kirby, 3; Sterling v. Peet, 14 Conn. 245.

<sup>1</sup> Cecconi v. Rodden, 147 Mass. 164.

<sup>2</sup> Coleman v. Ballard's Heirs, 13 La. Ann. 512.

<sup>3</sup> See King v. Kerr, 5 Ohio, 154;

Stebbins v. Wolf, 33 Kan. 765, quoting the text. In Wade v. Comstock, 11 Ohio St. 71, the court say the rule is adopted on principles of public policy.



if a conveyance is made of several parcels, and the grantee is evicted by paramount title from one of them, the value of that parcel, measured by the consideration, or the valuation at the date of eviction, as the rule may be, will be the measure of damages.<sup>1</sup> Applying the same rule to a case where a part of one parcel is lost by failure of title, or the title to the undivided part of the whole, the measure of damages is a ratable part of the consideration or value of such parcel, or of the entirety, ascertained in the same manner.<sup>2</sup> If the breach results from an unexpired term or lease the measure of damages will be the value of the use of the premises during the time the purchaser is deprived of them.<sup>3</sup> The amount agreed to be paid by the tenant will ordinarily be considered to be such value.<sup>4</sup> If a partial eviction results from the existence of a public easement the recovery is to be measured by the depreciation in the value of the land, if any, resulting from the burden, with interest from the time of the eviction, and the plaintiff's costs in the action which resulted in the establishment of the public right.<sup>5</sup> The object of the law being compensation according to the standard which has been indicated, any partial compensation, realized as an occupant, rendering the eviction less than a total loss, may reduce the recovery; as where the plaintiff has recovered from the evictor a sum for betterments, which passed to the covenantee with the land at the time of the sale.<sup>6</sup>

<sup>1</sup> *Whitzman v. Hirsh*, 87 Tenn. 513; *Mette v. Dow*, 9 Lea, 93; *Scheible v. Slagle*, 89 Ind. 323; *Butcher v. Peterson*, 26 W. Va. 447; *Clark v. Hargrove*, 7 Gratt. 399; *Dickins v. Sheppard*, 3 Murph. 526; *Raines v. Calloway*, 27 Tex. 678; *Griffin v. Reynolds*, 17 How. (U. S.) 609; *Morris v. Harris*, 9 Gill, 19; *Dougherty v. Duval's Heirs*, 9 B. Mon. 57; *Hunt v. Orwig*, 17 id. 73; *Boyle v. Edwards*, 114 Mass. 373; *Williams v. Beeman*, 2 Dev. 483; *Major v. Donnovant*, 25 Ill. 262; *Hoot v. Spade*, 20 Ind. 326; *Dimmick v. Lockwood*, 10 Wend. 142. See *King v. Ryle*, 8 S. & R. 166; *Adams v. Conover*, 22 Hun, 424; *Mischke v. Baughn*, 52 Iowa, 528;

*Long v. Sinclair*, 40 Mich. 569; *Winipiseogee Paper Co. v. Eaton*, 65 N. H. 13.

<sup>2</sup> *Id.*; *Downer v. Smith*, 38 Vt. 464.

<sup>3</sup> *Fritz v. Pusey*, 31 Minn. 368; *Moreland v. Metz*, 24 W. Va. 119, 139.

<sup>4</sup> *Moreland v. Metz*, *supra*.

<sup>5</sup> *Hymes v. Esty*, 133 N. Y. 342.

<sup>6</sup> *Booker v. Bell*, 3 Bibb, 173; *King v. Kerr*, 5 Ohio, 154; *Drury v. Shumway*, D. Chip. (Vt.) 111; *Mason v. Kellogg*, 38 Mich. 132.

In *Drew v. Towle*, 30 N. H. 531, it was held that a grantee of land under a deed containing covenants of warranty, who goes into possession, owes no duty to the grantor to remain in possession for the purpose

If the eviction is by some paramount charge or lien which may be discharged by payment of a sum not larger than the damages which would be recoverable if the eviction were under an absolute paramount title, as where a mortgagee enters for the purpose of foreclosure, the measure of damages is the amount of the debt so secured.<sup>1</sup> In *Tufts v. Adams*<sup>2</sup> land was granted by A. to T. with covenants against incumbrances and of general warranty, but incumbered by a mortgage to C., on which C. subsequently recovered conditional judgment and obtained possession of the land. While the land continued in T.'s possession he mortgaged it for a smaller amount than C.'s mortgage. After C. thus obtained possession T. brought an action against A. for breach of the covenants. And it was held: 1st. That the covenant against incumbrance was broken when the deed was executed, but that T. could recover only nominal damages, as he had paid nothing to remove the incumbrance. 2d. That the covenant of warranty was broken, and that the damages recoverable in the action was the amount of C.'s judgment for debts and costs, deducting the amount of the mortgage which T. had himself made; also, that if T., before judgment, paid off the mortgage made by himself, he could recover the whole amount without such deduction. In such cases the recovery is limited to the sum which would be sufficient to extinguish the adverse claim if the action on the covenant is brought while such claim is defeasible. But it has been held that a covenantee so evicted is not obliged to redeem, and that after the redemption expires and the title under the foreclosure becomes absolute he may recover full damages.<sup>3</sup> But it would

of litigating a question of the increased value of the estate from betterments while in possession of those under whom he claims, but may at once surrender to any one having the paramount title; and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. This seems to ignore the duty of a plaintiff to exert himself to lessen damages. See vol.

1, § 88; *Weed v. Larkin*, 49 Ill. 99; *Franklin v. Smith*, 21 Wend. 624; *Barmon v. Lithauer*, 4 Keyes, 317.

<sup>1</sup> *Donohoe v. Emery*, 9 Met. 63; *Tufts v. Adams*, 8 Pick. 547; *White v. Whitney*, 3 Met. 81; *Winslow v. McCall*, 32 Barb. 241; *Holbrook v. Weatherbee*, 12 Me. 502; *Furnas v. Durgin*, 119 Mass. 500.

<sup>2</sup> 8 Pick. 550.

<sup>3</sup> *Elder v. True*, 32 Me. 104; *Lloyd v. Quinby*, 5 Ohio St. 262; *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Hal-*

be otherwise if the covenantee owed purchase-money, presently payable, to the covenantor, and sufficient in amount to discharge the incumbrance or redeem the land.<sup>1</sup> So, if the covenantor leave in the hands of the covenantee money sufficient to remove the incumbrance, and the latter undertakes to procure a discharge of it, the covenant of warranty is satisfied.<sup>2</sup>

**§ 610. Where covenantee has extinguished adverse title.**

[291] Where the grantee purchases the land upon the foreclosure of a mortgage existing prior to the grant, this will give him a right of action on the covenants to the extent of the amount paid by him to relieve the land.<sup>3</sup> He cannot increase his recovery by assigning his bid to another and permitting him to obtain a deed.<sup>4</sup> So in other cases; if the covenantee has extinguished the adverse title, his recovery on any of the covenants will be limited to the amount paid by him for that purpose, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the limit of damages for a total breach.<sup>5</sup> In *Dale v. Shively*<sup>6</sup> the holders of the paramount title were Indians, and had to be searched for in the Indian Territory and their conveyances had to be approved by the secretary of the interior; it was held that the party so procuring the adverse title was en-

sey, 14 id. 48; *Burk v. Clements*, 16 Ind. 132; *Chapel v. Bull*, 17 Mass. 213; *Norton v. Babcock*, 2 Met. 510. See *Smith v. Dixon*, 27 Ohio St. 471.

<sup>1</sup> *Harper v. Jeffries*, 5 Whart. 26; *McGinnis v. Noble*, 7 W. & S. 454; *Mellon's Appeal*, 32 Pa. St. 121; *Copeland v. Copeland*, 30 Me. 446; *Pitman v. Connor*, 27 Ind. 337.

<sup>2</sup> *Blood v. Wilkins*, 43 Iowa, 565.

<sup>3</sup> *McGinnis v. Noble*, 7 W. & S. 454; *Andrews v. Appel*, 22 Hun. 429; *Cowdrey v. Coit*, 3 Robt. 210; S. C., 44 N. Y. 383; *Burk v. Clements*, 16 Ind. 132. See *Whitney v. Dinsmore*, 6 Cush. 124.

<sup>4</sup> *Cowdrey v. Coit*, *supra*.

<sup>5</sup> *Leffingwell v. Elliot*, 10 Pick. 204; S. C., 8 id. 457; *Thayer v. Clemence*, 22 Pick. 490; *Estabrook v. Smith*, 6

*Gray*, 572; *McGary v. Hastings*, 39 Cal. 360; *Lewis v. Harris*, 31 Ala. 689; *Swett v. Patrick*, 12 Me. 9; *Kelly v. Low*, 18 id. 244; *Fawcett v. Woods*, 5 Iowa, 400; *Dale v. Shively*, 8 Kan. 276; *Spring v. Chase*, 22 Me. 505; *Hurd v. Hall*, 12 Wis. 112; *Claycomb v. Munger*, 51 Ill. 373; *Bailey v. Scott*, 13 Wis. 619; *Loomis v. Bedel*, 11 N. H. 74; *McKee v. Bain*, 11 Kan. 569; *Yokum v. Thomas*, 15 Iowa, 67; *Dickson v. Desire*, 23 Mo. 151; *Lane v. Fury*, 31 Ohio St. 574; *Allis v. Nininger*, 25 Minn. 525; *Richards v. Iowa Homestead Co.*, 44 Iowa, 304; *Jones v. Lightfoot*, 10 Ala. 17. See *Brady v. Spureck*, 27 Ill. 478.

<sup>6</sup> 8 Kan. 276.

titled to pay for his time and trouble, traveling expenses and the amount paid for the title.

In *Leffingwell v. Elliott*<sup>1</sup> counsel fees paid were disallowed, but the court held that if the plaintiff was put to trouble and expense in extinguishing the paramount title he was entitled to compensation therefor; that he might recover for time thus employed, for expense of horses and carriages, and for board, as well as the expense of preparing for trial and attendance at court. This action was brought on the covenants against incumbrances and of warranty, and the plaintiff presented three classes of claims. The first was for expenses incurred, and money paid to extinguish the outstanding title before the commencement of the action. Of this class the auditor stated an account in which, besides the sums paid to extinguish the adverse titles, with interest from the time of the payments, there were charges for the plaintiff's time employed in extinguishing the titles, with interest from the service of the writ; for incidental expenses for horses and carriages, board and lodgings, while the plaintiffs were from home, and interest from the time the same were paid; and for sums paid for advice and services of counsel. The second class was for expenses incurred and payments made, similar to those in the first class, subsequently to the service of the writ, not, however, including counsel fees. The third class was for expenses and charges incurred in preparing this case for trial, including the summoning of witnesses, attendance at court, personal services of the plaintiffs, and counsel fees since the commencement of the suit. The court allowed in full the sums reported by the auditor in the first and second classes, except counsel fees; but not those in the third class.<sup>2</sup> [293]

<sup>1</sup> 10 Pick. 204.

<sup>2</sup> In *McKee v. Bain*, 11 Kan. 569, a deed of a vacant lot had been given by defendant to the plaintiff in 1868, containing covenants for title and good right to convey, for the consideration of \$6,500, of which \$2,050 was paid down, the balance being secured by notes and a mortgage of the lot payable in one and two years. McKee took possession of the lot

and made permanent and valuable improvements on it. Afterward, Thomas, claiming the paramount title, brought ejectment against McKee, and recovered judgment in 1870. Bain had notice of the pendency of this suit. The defendant obtained the benefit of the occupying claimant law, and the lot was valued at \$5,000; and the improvements at \$14,700. Thomas elected to take \$5,000 for the



But it has been held<sup>1</sup> that a vendee who is legally evicted, and who thereupon repurchases the property from the evictor, [294] is in under a new title, and the price last paid is no criterion of the damages sustained by the failure of the vendor's

lot, and the court ordered McKee to pay it. This sum being paid, a deed to McKee was made by Thomas in 1872. In the defense of that action McKee incurred \$500 for counsel fee, and the costs recovered in that suit by Thomas were \$196.25. The court trying the action upon the covenants found that the counsel fee was excessive beyond \$400. McKee brought an equitable action against Bain on the covenants of seizin and warranty in the deed, asking judgment for the amount paid down, for the amount paid in costs and counsel fees, and interest on those several amounts; also that the notes and mortgage be canceled, and that the apparent incumbrance resting upon the title by virtue of the mortgage be removed. Valentine, J., said: "The covenant of seizin is broken as soon as made if the title attempted to be conveyed is bad; and when the vendee afterwards buys in the paramount title, the measure of his damages, as against the vendor, is, as a rule, the amount, with interest, it necessarily costs to obtain the paramount title up to the amount of the purchase-money and interest. In some cases the vendee may also recover the costs and attorneys' fees necessarily paid by him in prosecuting or defending a suit, with reference to the land attempted to be conveyed. In the present case we think Mrs. McKee is entitled to recover from the Bains just the excess of what she has necessarily and actually paid over and above what she agreed to pay to the Bains. For instance: She agreed to pay as fol-

lows: cash down, \$2,050; two notes, \$4,000; interest on the notes to March 19, 1872, \$1,555.55;—total agreed to be paid up to March 19, 1872, \$7,605.55. She actually and properly paid as follows: Cash down, \$2,050; attorneys' fees, \$400; costs, \$196.25; for paramount title March 19, 1872, \$5,000;—total paid March 19, 1872, \$7,646.25. She therefore paid \$40.70 more than she agreed to pay for the lot. The judgment in this case was rendered November 16, 1872, for \$43.50, a little more than \$40.70 and interest. . . . The title of the Bains to said lot was derived through judicial proceedings, and although defective on account of irregularities, . . . yet it cannot be wholly ignored. The title was apparently good. The Bains acted in good faith in selling, and Mrs. McKee acted in good faith in purchasing and defending. Mrs. McKee obtained possession of said lot under and by virtue of Bain's title, and she held possession thereunder for nearly four years without paying anything therefor to the Bains, or to any one else, except what she paid as consideration for the lot; and she still continues to hold such possession, never having been in fact dispossessed. Bain's title, though defective, rested as a cloud upon the paramount title. By virtue of said conveyance from Bain to McKee, this cloud was extinguished, or rather transferred from the Bains to Mrs. McKee. This was something of value. And after the action between Mrs. Thomas and Mrs. McKee was determined, the

<sup>1</sup> Martin v. Atkinson, 7 Ga. 228.

title.<sup>1</sup> If the covenantee is a mortgagee, on a total breach the mortgage debt is the measure of damages.<sup>2</sup> And so in every variety of circumstances the recovery will be graduated to the actual injury.<sup>3</sup>

§ 611. **Mitigation of damages.** The damages for which the vendor is liable may be diminished by any profit which the vendee has recovered for from the owner in the action in which the judgment of eviction was rendered. The covenantor held under a tax deed; the covenantee recovered from the owner of the paramount title all taxes paid by the former with interest to the time of his eviction. It was ruled that the vendor was not merely entitled to the amount which he had paid as taxes, but also to the statutory interest thereon. The benefit of the statutory rate of interest on the money so paid accrued to the evicted party directly as the result of the imperfect title, and he not being bound to account to any other person for it, the vendor should be credited with it.<sup>4</sup> Where, after an eviction, possession has been restored, the right of action is not thereby destroyed, but such restoration will go in mitigation.<sup>5</sup> And so payments on account of such damages may be shown to lessen the vendor's liability.<sup>6</sup>

right of Mrs. McKee to compel Mrs. Thomas to purchase Mrs. McKee's improvements on said lot, and pay therefor \$14,700, or to sell the lot to Mrs. McKee, under the occupying claimant law, for \$5,000, was founded solely upon the title which Mrs. McKee obtained from the Bains. The title, therefore, which she got from Mrs. Thomas had its origin in the title she got from the Bains. Besides, Mrs. McKee appeals to a court of equity to cancel said notes and mortgage. Said mortgage was a cloud, and an apparent if not a real incumbrance upon the title to said lot. Is the removal of said cloud and said apparent incumbrance of no value? Now, by virtue of the conveyance from the Bains to Mrs. McKee, and the judgment in this case, Mrs. McKee has

obtained a good title to her lot, free and clear from all incumbrances or clouds, all she bargained for or expected to get, and all that she had any right to expect, and she has paid to all persons in the aggregate, only what she agreed to pay to the Bains. She has lost nothing by the failure of the Bains' title."

<sup>1</sup> Compare *Claycomb v. Munger*, 51 Ill. 373, and *Hunt v. Orwig*, 17 B. Mon. 73, 85.

<sup>2</sup> *Curtis v. Deering*, 12 Me. 499; *Wetmore v. Green*, 11 Pick. 462.

<sup>3</sup> *Richards v. Iowa Homestead Co.*, 44 Iowa, 304.

<sup>4</sup> *Stebbins v. Wolf*, 33 Kan. 765; *Danforth v. Smith*, 41 id. 146.

<sup>5</sup> *Baxter v. Ryerss*, 13 Barb. 267.

<sup>6</sup> *Ferris v. Mosher*, 27 Vt. 218.

§ 612. **Where defect is a dower right.** Where there is an eviction by a dowress the measure of damages is the value of the particular right estimated according to the expectation of life of the tenant in dower on the basis of the amount paid being the value of the fee-simple.<sup>1</sup> The cases show many ways of expressing and arriving at this value; as, that it is the amount that the fee-simple interest is diminished in value by carving out the life estate, estimating the value of the fee-simple interest according to the consideration money paid to the covenantor;<sup>2</sup> that is, the present value of an annuity equal to the interest on one-third of the consideration money for the time that the tenant in dower has a probable expectation of life.<sup>3</sup> The amount reasonably paid for release of the right of dower, or the amount assessed in lieu of it, under statutes which provide for such commutation, will also constitute the basis of recovery for breach of the covenants where the defect of title is thus cured.<sup>4</sup> Where the eviction was by paramount [295] title for a term of years, the plaintiff was held entitled to the annual value of the land of which he was dispossessed, or the interest on the consideration paid for it.<sup>5</sup>

§ 613. **By and against whom recovery may be had.** As these covenants run with the land they are available to any person succeeding the covenantee by purchase or descent.<sup>6</sup> It is not necessary that a conveyance be made with warranty in order that the covenants pass; they will pass by release or quitclaim.<sup>7</sup> Consequently, the action should be brought by him in whose time the breach occurs.<sup>8</sup> The covenants are

<sup>1</sup> *Stewart v. Mathieson*, 23 Up. C. P. 146; *Jeter v. Glenn*, 9 Rich. Can. Q. B. 135; *Western v. Short*, 12 374; *Maguire v. Riggan*, 44 Mo. 512; *B. Mon.* 153; *Davis v. Logan*, 5 id. *Welsh v. Kibler*, 5 S. C. 405. See 341; *Terry v. Drabenstadt*, 68 Pa. St. *Cuthbert v. Street*, 9 Up. Can. C. P. 400; *Hill v. Golden*, 16 B. Mon. 551; 115.

*Bender v. Fromberger*, 4 Dall. 436; <sup>5</sup> *Rickert v. Snyder*, 9 Wend. 416.  
*Brown v. Dickerson*, 12 Pa. St. 372; <sup>6</sup> *Roe v. Hayley*, 12 East, 464;  
*Patterson v. Stewart*, 6 W. & S. 527. *Rawle on Cov. Tit.* 561.

<sup>2</sup> *Johnson v. Nyce*, 17 Ohio, 66.

<sup>3</sup> *Wager v. Schuyler*, 1 Wend. 553. <sup>7</sup> *Beddoe v. Wadsworth*, 21 Wend. 120; *Wilson v. Widenham*, 51 Me. 566; *Hunt v. Middlesworth*, 44 Mich. 448. See *Claycomb v. Munger*, 51 Ill. 373.

was put at seventeen years.

<sup>4</sup> *Hodgins v. Hodgins*, 13 Up. Can. <sup>8</sup> *Kane v. Sanger*, 14 Johns. 89; *Bickford v. Page*, 2 Mass. 455, 460;

divisible, and their benefits will go to each recipient of any part or interest in the lands to which they relate, and may be sued on separately in respect of any breach as to the portion taken by him.<sup>1</sup> If the covenantee has sold a portion of the land conveyed to him he can recover only for the failure of the title to the portion from which he was evicted, although the subsequent vendees are barred by the statute of limitations.<sup>2</sup> The evicted grantee may bring suit against the first or any intermediate covenantor; he may bring separate actions against all, either at the same time or successively, [296] and prosecute them to judgment; he is entitled, however, to but one satisfaction and his costs.<sup>3</sup>

§ 614. When covenantee sues remote covenantor. Where the action is brought by a remote grantee there is some di-

Keith v. Day, 15 Vt. 660; Booth v. Starr, 1 Conn. 244; Thompson v. Sanders, 5 T. B. Mon. 358; Cunningham v. Knight, 1 Barb. 399; Claycomb v. Munger, 51 Ill. 373; Crooker v. Jewell, 29 Me. 527; Hunt v. Midldesworth, 44 Mich. 448; Tillotson v. Prichard, 60 Vt. 94.

<sup>1</sup> Whitzman v. Hirsh, 87 Tenn. 513, quoting the text; Dart on Vendors & P. 365; 3 Washb. on R. P. (5th ed.) 503; Dickinson v. Hoomes, 8 Gratt. 406; Brown v. Metz, 33 Ill. 339; Kane v. Sanger, 14 Johns. 89; Dougherty v. Duvall, 9 B. Mon. 57; Twynam v. Pickard, 2 B. & Ald. 105; Midgley v. Lovelace, Carthew, 289; Paul v. Witman, 3 W. & S. 407; Henninger v. Turner, 4 B. & C. 157; Swett v. Patrick, 12 Me. 9; Lamb v. Danforth, 59 id. 322.

In Dart on Vend. & P. 365, it is said: "Where the estate is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, each can sue for damages proportioned to the extent of his estate." Noble v. Cass, 2 Sim. 343. Compare McClure v. Gamble, 27 Pa. St. 288. And on page 780, volume 2 (5th Eng. ed.), this author

says: "Where the estate is merely equitable there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee; so, if the conveyance, although so intended to do, do not, in fact, pass any legal estate, it appears that the assignee cannot sue; but, in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee. See Riddell v. Riddell, 7 Sim. 529; Thornton v. Court, 3 De G., M. & G. 393."

<sup>2</sup> Whitzman v. Hirsh, 87 Tenn. 513.

<sup>3</sup> King v. Kerr, 5 Ohio, 154; Wilson v. Taylor, 9 Ohio St. 595; Dougherty v. Duvall, 9 B. Mon. 57; Crooker v. Jewell, 29 Me. 527; Claycomb v. Munger, 51 Ill. 373; Crisfield v. Storr, 36 Md. 129; Williams v. Beeman, 2 Dev. 483; Hunt v. Orwig, 17 B. Mon. 73; Lot v. Parish, 1 Litt. 393; Lowe v. McDonald, 3 A. K. Marsh. 354; Birney v. Haim, 2 Litt. 263; Thompson v. Sanders, 5 T. B. Mon. 358; Birney v. Hann, 3 A. K. Marsh. 322; Withy v. Mumford, 5 Cow. 137; Garlock v. Closs, id. 143, note; Suydam v. Jones, 10 Wend. 180; Cummings v. Harrison, 57 Miss. 275.



versity as to the criterion of damages. Is it the consideration paid to the original covenantor, who is the defendant, or that paid by the plaintiff to his grantor? In Kentucky the rule is the consideration received by the defendant.<sup>1</sup> In one case a suit was brought by a remote grantee, and it was sought to limit his recovery to the amount he paid, and it was insisted in behalf of the defendant that the plaintiff should disclose that amount. In reply the court said: "It does not appear what amount he paid for it, nor was he called upon to state, nor was it shown in any other way. If it were conceded that the plaintiff's recovery ought to be limited to the amount paid by him for the superior title, were that amount manifested, it cannot be so limited, as this amount is not made to appear. Nor do we perceive that it was the duty of the plaintiff to disclose the amount in order to limit his recovery without his being called upon to do so. *Prima facie* the plaintiff had a right to recover the consideration in the deed of (the covenantor) proportioned to the land lost, and this is the amount decreed by the court."<sup>2</sup> In South Carolina, North Carolina, Tennessee and Maryland, the basis of recovery is the consideration paid by the plaintiff to his immediate grantor,<sup>3</sup> with interest and costs of the ejectment suit, in all not exceeding the consideration received by the defendant.<sup>4</sup>

<sup>1</sup> Dougherty v. Duvall, 9 B. Mon. 57.

<sup>2</sup> Hunt v. Orwig, 17 B. Mon. 73.

<sup>3</sup> Crisfield v. Storr, 36 Md. 129; Williams v. Beeman, 2 Dev. 483; Lawrence v. Robertson, 10 S. C. 8; Mette v. Dow, 9 Lea, 93.

<sup>4</sup> In Williams v. Beeman, 2 Dev. 483, Henderson, C. J., said: "In actions between the vendee and his immediate vendor upon the covenant for quiet enjoyment, it is the settled law of this state that the value of the lands at the time of the sale shall be the measure of the damages; and in case of actual sales the purchase-money is conclusive evidence of that value. This is the case where a covenant of warranty is annexed to an estate in fee, and the eviction is from

the whole estate. What may be the rule where there is a partial eviction of the estate, or other interest less than a fee, or where the covenant is annexed to an estate less than a fee, is, as far as I know, not determined by our courts. The interest upon the purchase-money is merely incidental, and depends on the circumstances of each case. It ordinarily runs during the time that the tenant is liable for the profits to the rightful owner. When he is not so liable the profits are set off against it. Had this action therefore been brought against Glasgow, Williams' immediate vendor, it would have presented no difficulties, governing ourselves by former decisions. Is the case varied by being brought against Beeman, a remote vendor.

In New York and Mississippi the warrantor is liable according to the value of the land at the time of his warranty, which is conclusively fixed at the amount of the consideration of the sale.<sup>1</sup> In Missouri the rule has been thus stated: "If a subsequent purchaser be evicted the damage is the value of the land at the time of the eviction, not exceeding, how- [298] ever, the sum for which the covenantor would have been liable to the first purchaser."<sup>2</sup>

and whose estate, with his covenants annexed thereto, have come to Williams? I think that it is not; for Beeman cannot be bound to pay to Williams more than Williams ought to receive. If he has money in his hands belonging to some other person, there is no reason why it should be paid to Williams. Now it is settled that the purchase-money paid by Williams to Glasgow is the measure of Williams' damages, and the fact that he is substituted to the estate of Sheppard, and to the covenants entered into with Sheppard for its enjoyment and protection, does not thereby substitute him to Sheppard's claim to damages in case the latter had been evicted. He is only substituted to Sheppard's covenants to redress his own, not Sheppard's injuries in regard to the estate. But as there is no privity of contract between Williams and Beeman, the injury of the former cannot exceed the liability of the latter upon his covenants. But it may fall short of it. Neither would the case be varied if the action had been brought by Sheppard, as it is said it might be. For Sheppard having sold to Glasgow, and Glasgow to Williams, he, Sheppard, could only claim an indemnity, which is the amount of the consideration money paid by him who is evicted. And on this ground alone, or that he is trustee for the person evicted, can the action be sustained in his name. In either case

Williams' injury is the one to be compensated. Should it be asked what is to become of the excess left in the hands of Beeman — for it is certain that he has given nothing for it — it is answered, who can claim it? Not Williams, for under the rule established by our decisions he has no pretense to recover it. Not Sheppard, for he sustains no damage by the bad title, further than he may be compelled to comply with the covenants in his deed. And it would be strange that he should be placed in a better situation by selling a bad title than a good one. For had the title been good, he must have been content with his loss upon his resale. Should it turn out to be bad, could he then regain his whole purchase-money? In fact, the difference between what he gave and what he got for the land is sunk, is extinguished, and there is no person who can receive it by making a resale at a reduction in the price. The first vendee submits to the loss, and it can therefore form no part of a claim to an indemnity."

<sup>1</sup> Jenks v. Quinn, 61 Hun, 427; Petrie v. Folz, 54 N. Y. Super. Ct. 223; Brooks v. Black, 68 Miss. 161.

<sup>2</sup> Dickson v. Desire, 23 Mo. 151.

The general rule that the consideration stated in a deed is open to explanation does not apply in an action on the covenant of warranty brought by a subsequent grantee; the sum named is the measure of his recov-

An intermediate grantee may recover against an antecedent covenantor if he has suffered actual injury, though the eviction did not occur while he held the estate. If he conveyed without covenants to the evicted grantee for full value, he suffers no injury and has no right of action.<sup>1</sup> But if he conveyed with covenants and has satisfied them, they are restored to him, and he may sue any covenantor from whom he claims for his indemnity.<sup>2</sup>

[299] A tenant who has been evicted may sue any prior covenantor, and if he elects any but the first, and obtains satisfaction, such covenantor may, thereby, stand as to any prior cov-

ery. *Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Greenwault v. Davis*, 4 Hill, 643.

<sup>1</sup> *Booth v. Starr*, 1 Conn. 244; *Wyman v. Ballard*, 12 Mass. 304; *Niles v. Sawtell*, 7 id. 444.

<sup>2</sup> *Claycomb v. Munger*, 51 Ill. 373; *Baxter v. Ryerss*, 13 Barb. 267; *Lot v. Parish*, 1 Litt. 393; *Wheeler v. Sohler*, 3 Cush. 219; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Herrin v. McEntyre*, 1 Hawks, 410.

In *Birney v. Hann*, 3 A. K. Marsh. 322, *Mills, J.*, said: "The question whether an intervening grantee, who had conveyed away the estate, can support the same action against a remote grantor, has never yet been decided. On this question we need not look for any aid from English precedents, where such an action of covenant was not indulged. In this case the plaintiff below has averred that *Fields and Dunn*, who were evicted from the lot, recovered a judgment against him on his warranty for the value of the land, with interest and costs, which judgment he had fully paid and discharged before the commencement of this suit. If this statement in the declaration can be material to, or aid him in support of, his action, as it is not contradicted by any plea, it must be taken as true, and the plaintiff below is en-

titled to the benefit of these facts. The question remains, will they affect his case and enable him to support his action? As *Hann* would have been entitled to the action if he had never conveyed; as he has been subjected to the action because he had conveyed; as the estate passed by the title has gone into other hands; and his deed to *Fields and Dunn* can be of no more avail to them because they have once had the benefit of it, and it is now inoperative against *Hann* because it is merged in the judgment against him and discharged by payment, we see no good reason why *Hann* should not be adjudged to have the right of action revested in him, and be restored to all he parted with by his deed, as much so as if *Field and Dunn* had reconveyed. As the indorser of a commercial instrument, who has paid its contents, can sustain his action against his remote indorser without a re-indorsement, because his own indorsement, by the act of payment, *per se*, has become *functus officio* as to him, so ought *Hann*, who has rendered his own deed inoperative further against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." *Hunt v. Middlesworth*, 44 Mich. 448.

enantor in the place he held before he had parted with the estate, and sue upon his covenant as though the breach had occurred during his ownership.<sup>1</sup>

Where a grantee has been evicted by virtue of a judgment against him, the judgment is legally admissible to prove the eviction in an action on the covenant in the deed;<sup>2</sup> but not to prove that such eviction was by paramount title unless the covenantor was vouched in to defend.<sup>3</sup> But if he had notice of that action and an opportunity to appear and defend, the judgment of eviction is evidence, and conclusive of the title.<sup>4</sup> The same principle has been applied in cases of judgments against the grantee in actions brought by him to recover the granted property, where the covenantor had been notified to take upon himself the prosecution thereof.<sup>5</sup>

**§ 615. Notice of suit to covenantor.** One who is sued upon his covenant of warranty may vouch in his warrantor, and he, in turn, may vouch in his; and a judgment in such action, so far as the subject-matters tried are concerned, will be binding upon the rights of any such previous warrantor properly vouched in or summoned to take the defense [300] of the suit whether he does so or not.<sup>6</sup>

<sup>1</sup> 3 Wash. R. P. 400; *Withy v. Mumford*, 5 Cow. 137; *Thompson v. Shattuck*, 2 Met. 618; *Suydam v. Jones*, 10 Wend. 184; *Booth v. Starr*, 1 Conn. 244; *Markland v. Crump*, 1 Dev. & B. L. 94; *Redwine v. Brown*, 10 Ga. 311.

<sup>2</sup> *Hardy v. Nelson*, 27 Me. 525; *Gaither v. Brooks*, 1 A. K. Marsh. 409; *Patton v. Kennedy*, id. 389; *Middleton v. Thompson*, 1 Spears, 67; *Crisfield v. Storr*, 36 Md. 129.

<sup>3</sup> Id.; *Harding v. Larkin*, 41 Ill. 413; *Ryerson v. Chapman*, 66 Me. 557; *Sheetz v. Longlois*, 69 Ind. 491.

<sup>4</sup> Id.; *Hamilton v. Cutts*, 4 Mass. 349; *Blasdale v. Babcock*, 1 Johns. 518; *Sanders v. Hamilton*, 2 Hayw. 282; *Dalton v. Bowker*, 8 Nev. 190; *Fulweiler v. Baugher*, 15 S. & R. 45; *Jeter v. Glenn*, 9 Rich. 374; *Ferrell v. Alder*, 8 Humph. 44; *Knapp v. Marl-*

*boro*, 34 Vt. 234; *Terry v. Drabens- stadt*, 68 Pa. St. 400; *Williamson v. Williamson*, 71 Me. 442.

<sup>5</sup> *Dalton v. Bowker*, 8 Nev. 190; *Ryerson v. Chapman*, 66 Me. 557. But see *Ferrell v. Alder*, 8 Humph. 44; *Wilder v. Ireland*, 8 Jones' L. 85.

<sup>6</sup> 3 Wash. R. P. 402; *Chamberlain v. Preble*, 11 Allen, 373; *Boston v. Worthington*, 10 Gray, 498; *Little- ton v. Richardson*, 34 N. H. 187; *And- rews v. Denison*, 16 id. 469; S. C., 17 id. 413; *Mason v. Kellogg*, 38 Mich. 132 (notice to the covenantor should be in writing); *Williamson v. Will- iamson*, 71 Me. 442; *Bever v. North*, 107 Ind. 544; *Cummings v. Harrison*, 57 Miss. 275 (verbal notice and op- portunity to defend, without demand, concludes the covenantor); *McCon- nell v. Downs*, 48 Ill. 271. *Contra*, *Martin v. Cowles*, 2 Dev. & Batt. 101;



§ 616. **Interest as an item of damage.** Interest is not recoverable when the premises have been occupied by the warrantee, and he has not accounted and is not accountable for the rents and profits. It would be unjust. He who buys a farm, or house and lot, agrees to part with the use of the consideration forever for the use of the farm or house and lot forever. As long as he has the use of either, so long should the seller have the use of the consideration.<sup>1</sup> In such case the use and occupation are presumed to be equal to the use of the purchase-money.<sup>2</sup> And if not, the grantee has no ground for complaint while he is undisturbed in the enjoyment of that for which he was content to pay the purchase-money.<sup>3</sup>

In case of eviction by the owner of the superior title, he is entitled to recover *mesne* profits for such period as is allowed by the statutes of limitation. For this period the grantee is treated as not enjoying the granted premises in virtue of the [301] grant; and for the time he is so liable, as well as for the time succeeding actual eviction, or the fact which is treated as equivalent thereto, interest is recoverable on the principal of the damages allowed.<sup>4</sup> Where payments have been made

Wilder v. Ireland, 8 Jones' L. 88. See, as to the requisites of the notice, Rawle on Cov. Tit. (5th ed.), § 119.

<sup>1</sup> King v. Kerr, 5 Ohio, 154.

<sup>2</sup> Collier v. Cowger, 53 Ark. 322; Stebbins v. Wolf, 33 Kan. 765, quoting the text; Gunter v. Beard, 93 Ala. 227, citing the text; Hutchins v. Roundtree, 77 Mo. 500; Wood v. Kingston Coal Co., 48 Ill. 356; Harding v. Larkin, 41 id. 413; Cox v. Henry, 32 Pa. St. 18; Sumner v. Williams, 8 Mass. 162, 221.

In the last case Sedgwick, J., said: "Covenants having been broken at the time of the execution of the deed, a cause of action immediately accrued. The real injury was then sustained, and the amount of indemnity for it precisely the money which had been paid for a defective title. In such a case as this, if the grantee cannot enter into possession, he is entitled to demand immediately the

money which he has paid; and if he receives it, it must be deemed a satisfaction of the injury. If there is delay, there must be interest on the amount of the purchase-money commensurate with the delay; and that interest the law deems a satisfaction for the delay. If the grantee enters into possession, the profits of the improvements are deemed equivalent to the interest; but as he may be compelled to account for those profits and pay them over to the owner, he is for that reason entitled to demand the interest, with the purchase-money, in an action upon his covenant." See Selden v. James, 6 Rand. 465.

<sup>3</sup> Spring v. Chase, 22 Me. 505; Kyle v. Fauntleroy, 9 B. Mon. 620.

<sup>4</sup> Point Street Iron Works v. Turner, 14 R. I. 122; Mette v. Dow, 9 Lea, 93; McGuffey v. Humes, 85 Tenn. 26; Hutchins v. Roundtree, 77

under an antecedent contract, pursuant to which the deed was executed, the grantee is not concluded as to the damages by the execution of the deed or the recital of the consideration therein; the amount actually paid may be recovered, and interest on payments made before the deed was executed.<sup>1</sup>

Wherever the circumstances are such as to preclude any recovery for *mesne* profits interest will not be allowed until eviction.<sup>2</sup> Thus, where the grantee was evicted by a later patent, as he was not liable to the evictor for profits prior to the patent, there was no right to interest during that prior time.<sup>3</sup> So interest was denied where the right to *mesne* profits was barred by failure to claim them in the time and manner fixed by law.<sup>4</sup> Only simple interest at the legal rate is computed, and neither the interest nor consideration, as principal, is to be increased by the fact that it was payable by instalments at annual or any higher than the legal rate. Nor will the consideration be increased by the payment of taxes.<sup>5</sup> In a late case in Iowa,<sup>6</sup> an action was brought upon a note, a part of the consideration of which was for land conveyed by the payee to the maker with warranty, and to which the title had failed. The failure of title was set up as a defense to so much of the note as was purchase-money. The note stipulated for interest at the rate of ten per cent., the ordinary legal rate being six. The plaintiff contended that the consideration for the land and interest at the ordinary legal rate was the proper measure of deduction; but the court held that it was just to abate the conventional rate as well as the principal.

§ 617. **Expenses, costs and counsel fees as damages.** The rule of damages for a total breach of the covenants in a deed

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| <p>Mo. 500; Lambert v. Estes, 99 id. 604; Brooks v. Black, 68 Miss. 161; Gunter v. Beard, 93 Ala. 227; Jackson v. Turner, 5 Leigh, 127; Rich v. Johnson, 2 Pin. 88; Morris v. Rowan, 17 N. J. L. 304; Sumner v. Williams, 8 Mass. 162; Stewart v. Drake, 9 N. J. L. 139; Backus v. McCoy, 3 Ohio, 211; Cox v. Henry, 32 Pa. St. 18; McAlpine v. Woodruff, 11 Ohio St. 120; Clark v. Burr, 14 Ohio, 118;</p> | <p>Fernandez v. Dunn, 19 Ga. 497; Cogswell v. Lyon, 3 J. J. Marsh. 38. See Booker v. Bell, 3 Bibb, 173.<br/> <sup>1</sup> Devine v. Lewis, 38 Minn. 24.<br/> <sup>2</sup> Wead v. Larkin, 49 Ill. 99; Thompson v. Jones, 11 B. Mon. 365; Whitlock v. Crew, 28 Ga. 289.<br/> <sup>3</sup> Whitlock v. Crew, <i>supra</i>.<br/> <sup>4</sup> Wead v. Larkin, <i>supra</i>.<br/> <sup>5</sup> Blake v. Burnham, 29 Vt. 437.<br/> <sup>6</sup> Zent v. Picken, 54 Iowa, 535.</p> |
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of land is often stated in general terms to be the amount of the consideration money and interest. This has been done [302] sometimes in the absence from the case of any item of expense or costs; sometimes in a direct contrast of this basis of recovery with that of the value at the time of eviction, and when of course other and incidental items common to both would not be mentioned; and in other instances purposely to exclude any items which would extend the recovery beyond consideration and interest.<sup>1</sup> It is held that the grantee has the right to defend; he is justified in making every fair effort to retain the land which he must be understood to have purchased for his own convenience and advantage, because an equivalent in value may not be equally satisfactory.<sup>2</sup> It has been declared to be his duty to defend.<sup>3</sup> Where, at the date of the deed, the premises are adversely possessed, and the grantee, or his assignee, suffers that adverse possession to ripen into a title by continuance until an action to recover is barred by the statute of limitations, he has no right of action as for a breach of the covenant of warranty; because in such a case the land is not lost by a paramount title existing at the date of the covenant but by his own laches.<sup>4</sup> It is therefore well settled by the best authorities that in actions for breach of the covenants, where there has been an eviction by suit, the plaintiff is entitled to recover damages, not only for loss of the land, usually, as we have seen, measured by the consideration paid with interest, but also costs reasonably and in good faith incurred in defending the title and resisting the eviction.<sup>5</sup>

<sup>1</sup> *Crisfield v. Storr*, 36 Md. 129; *Turner v. Miller*, 42 Tex. 418; *McGary v. Hastings*, 39 Cal. 360; *Eaton v. Lyman*, 24 Wis. 438.

<sup>2</sup> *Swett v. Patrick*, 12 Me. 9.

<sup>3</sup> *Staats v. Ten Eyck*, 3 Cai. 111.

<sup>4</sup> *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. 36.

<sup>5</sup> *Cushman v. Blanchard*, 2 Me. 266; *Swett v. Patrick*, 12 id. 9; *Ryerson v. Chapman*, 66 id. 557; *Drew v. Towle*, 30 N. H. 531; *Prescott v. Trueman*, 4 Mass. 627; *Delavergne v. Norris*, 7 Johns. 358; *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. 1; *Waldo v. Long*, 7 id. 173;

*Bennett v. Jenkins*, 13 id. 50; *Funk v. Voneida*, 11 S. & R. 109; *Stanard v. Eldridge*, 16 Johns. 254; *Taylor v. Holter*, 1 Mont. 688; *Dalton v. Bowker*, 8 Nev. 190; *Morris v. Rowan*, 17 N. J. L. 304; *Cox v. Strode*, 2 Bibb, 273; *Robertson v. Lemon*, 2 Bush, 301; *Armstrong v. Percy*, 5 Wend. 535; *Rickert v. Snyder*, 9 id. 416; *Leffingwell v. Elliott*, 10 Pick. 204; *Kennison v. Taylor*, 18 N. H. 220; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Stuart v. Matheison*, 23 Up. Can. Q. B. 135; *Harding v. Larkin*, 41 Ill. 413; *Lot v. Parish*, 1 Litt. 393; *Lane v. Fury*, 31 Ohio St. 574; *Will-*

And it does not appear to be necessary on principle or [303] authority that such costs should be incurred by the grantee as a defendant in actions by the claimant of the superior title. They are equally recoverable if necessarily incurred in proper proceedings taken by him to ascertain and protect the title supposed to be conveyed or to obtain possession of the land.<sup>1</sup>

iamson v. Williamson, 71 Me. 442; Swartz v. Ballou, 47 Iowa, 188; Stebbins v. Wolf, 33 Kan. 765.

<sup>1</sup>Pitkin v. Leavitt, 13 Vt. 379; Haynes v. Stevens, 11 N. H. 28; Kingsbury v. Smith, 13 id. 109; Gregg v. Richardson, 25 Ga. 570; White v. Williams, 13 Tex. 258; Yokum v. Thomas, 15 Iowa, 67; Lane v. Fury, 31 Ohio St. 574; Merritt v. Morse, 108 Mass. 270. See Ferrell v. Alder, 8 Humph. 44.

In *Kingsbury v. Smith*, *supra*, the action was brought on an implied warranty of the title in the sale of a chattel. K. purchased it of C., who previously had purchased and got possession of it from S. by fraud. In an action of trover by K. against S., who had repossessed himself of the chattel, C. was offered as a witness, and he was objected to as incompetent on the ground of interest, being liable to K. on his warranty of title for the costs incurred in that action if the plaintiff should fail. Woods, J., after citing many cases, said: "The principle deducible from the cases cited would seem to be that the grantee, in an action upon a covenant of warranty, express as in a deed, or implied as upon a sale of personal property, is entitled to recover, as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as well as reasonable compensation for

his trouble and expenses to which he may have been put in extinguishment of a paramount title. And it seems to us that there can be no sound distinction between the case in which the expenses are incurred in the necessary and proper prosecution of a suit for the ascertainment and protection of the purchaser's rights, and the case of a defense for the same purpose. In the case under consideration it would, in our view, fall little short of absurdity to hold that if the plaintiff had kept possession of the horse, and the defendant had brought suit, the plaintiff would be entitled to recover as damages, in a suit against Chandler on the implied warranty of title, the expenses of the defense, and at the same time hold that when the defendant had got possession of the horse, and the only means left the plaintiff for the ascertainment and protection of his rights is the very suit he has brought, he would not be entitled, in an action on the warranty against Chandler, to recover the expenses of the present suit properly and necessarily incurred, in the event of a failure of success, by reason of the failure of the title conveyed to him by Chandler. Such a doctrine, making such a distinction, we think cannot be sustained upon sound reason, or upon well-considered decisions, which go to establish the right of recovery of the costs and expenses, as clearly, we think, in one case as in the other."



[304] Where several suits and cross-suits have been brought, involving the title to the property conveyed, and these were properly and in good faith prosecuted or defended by the grantee, the costs and expenses of all have been allowed as proper damages in addition to compensation for loss of the land. This proposition is very clearly declared and maintained in a late case in Maine,<sup>1</sup> in which Peters, J., delivering the opinion, said: "The foundation of a claim for damages under it (the covenant of warranty) must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defense of the title warranted to him. Weston, C. J., says: 'He (the covenantee) was justified in making every fair effort to retain the land.'<sup>2</sup> If he is assaulted with ever so many suits he must defend them, unless it is clear that a defense would avail nothing. If he defends but one, and lets the others go by default, he might get himself into inextricable trouble. It is as essential that he should defend all the suits as well as any one of them. A defender of a walled city might as well plant all his means of defense at a single gate and leave all the others undefended, to be entered by the enemy. The covenantee becomes the agent of the warrantor in making a defense against suits. He should do for his warrantor what the warrantor should do for himself, if in possession. It is no more expensive for the warrantor to defend suits brought against his agent than suits against himself, and the presumption is that he would have been a party to the same litigations had he remained in possession. But the agent must act cautiously and reasonably. He has no right to 'inflammé his own account,'<sup>3</sup> nor indulge in mere quarrelsome cases. It follows, therefore, that the plaintiff may recover for the damages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him affecting the title to the estate. Each suit may have been part of the means by which the title was sought to be defeated."<sup>4</sup>

<sup>1</sup> Ryerson v. Chapman, 66 Me. 557.

<sup>2</sup> Swett v. Patrick, 12 Me. 9.

<sup>3</sup> Short v. Kalloway, 11 A. & El. 28.

<sup>4</sup> In Ryerson v. Chapman, 66 Me.

557, the defendant getting a supposed

title to a parcel of land by levy, con-

§ 618. **Same subject.** Cases may, and have, occurred [305] where the superior title asserted is so obviously well founded that resistance cannot be made in good faith; then the covenantee cannot defend at the expense of the covenantor.<sup>1</sup> It is also true that in other cases the grantee is not obliged at his peril to decide upon the title. He may defend without notice to his warrantor, and even exclude him from co-operation in defending the title,<sup>2</sup> without affecting his liability upon the covenant. And it may be doubted that the covenantor, when notified to defend, can affect his liability in respect to costs, afterwards incurred by the grantee, by silence, or direction not to defend. In a New Jersey case<sup>3</sup> *Hornblower, C. J.*, pointedly said: "Suppose the defendants, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defense he must do it at his own risk and expense; would that have availed them anything? I think not. It would place a grantee in hazardous circumstances, if, upon such an intimation from his grantor, he must either defend at his own expense, or abandon the title, and look for compensation in damages under his covenants. On the contrary, I am of opinion that, notwithstanding such notice from the covenantor, the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." In Pennsylvania the rule seems to be otherwise. In a recent case, where the [306] alleged breach of covenant was the recovery of a life estate in

veyed it to the plaintiff by a warranty deed. The latter had been in undisturbed possession under the deed for about fifteen years when his possession was invaded by one C., who claimed title to the land upon the ground that the levy under which the defendant acquired the land was defective and void. The plaintiff sued C. and C. sued him in actions of trespass, and several other suits followed between them. While all the suits were pending, one of them was carried up to decide the question of title to the land, and C. prevailed.

After this the defendant paid to the plaintiff all the costs and counsel fees incurred in the defense of that action, and also paid him the value of the land from which he had been evicted, but refused to pay the damages, costs and expenses incurred in the other actions.

<sup>1</sup> *Cushman v. Blanchard*, 2 Me. 268; *Hodgins v. Hodgins*, 13 Up. Can. C. P. 146; *Drew v. Towle*, 30 N. H. 531; *Ryerson v. Chapman*, 66 Me. 557.

<sup>2</sup> *Boyle v. Edwards*, 114 Mass. 373.

<sup>3</sup> *Morris v. Rowan*, 17 N. J. L. 304.

dower, Sharswood, J., said: "Without undertaking to lay down any general rule, it would seem to be most reasonable to hold that where a covenantor has been notified to appear and defend, and declines or fails to do so, and the covenantee chooses to proceed and incur costs and expenses in what it may be presumed that the covenantor considered to be an unnecessary and hopeless contest, he does so certainly upon his own responsibility."<sup>1</sup> In a Maryland case the court say: "Where such notice is given, and the party notified refuses to defend the title, the covenantee, or his assignee, has the right to employ counsel for that purpose; and may recover in an action on the covenant such reasonable fees as he has been compelled to pay."<sup>2</sup> This is in accord with the rule in Rhode Island.<sup>3</sup> Where there is such conflict of authority no rule can be stated that has general force as law. But recognizing that the grantee has a right to defend the title warranted to him, or to have it defended, if the covenantor declines to intervene for that purpose on request, the grantee ought to be at liberty to defend for himself; and on the principle of allowing full compensation for actual loss, if the title warranted fails, the expense and cost of defending it should fall on the party who covenanted to warrant and defend it and has broken his covenant. After the covenantor has come into court on notice and assumed the defense, the grantee is not entitled also to employ counsel for his own protection, and charge the expense, in the event of failure of title, to the covenantor.<sup>4</sup>

As to the necessity and effect of notice to the covenantor to defend there is considerable diversity of opinion in other respects, as will appear by the cases already referred to and others. But as the covenant to defend is as absolute as that to warrant the title, notice would not seem to be more necessary in respect to costs and expenses, reasonably incurred in good faith in the defense of the title, than to confer a right to be compensated for the loss of the land. In a case already mentioned Ford, J., said: "The defendant's counsel supposes [307] the costs on eviction are allowed, because it was the warrantor's duty to defend the suit upon receiving notice of

<sup>1</sup> Terry v. Drabenstadt, 68 Pa. St. 400.

<sup>3</sup> Point Street Iron Works v. Turner, 14 R. I. 122.

<sup>2</sup> Crisfield v. Storr, 36 Md. 129.

<sup>4</sup> Kennison v. Taylor, 18 N. H. 220.

the action; and he objects to them in this case because no notice was given to the warrantor or his representatives of the pendency of the action. But all the cases agree in allowing the costs of eviction, and it is immaterial whether he had notice or not. His covenant to defend is not a conditional one if he has notice; otherwise a want of notice would bar the warranty itself. He covenants to defend as absolutely as he does to warrant. The intent of notice is not to make him liable for costs; it is to make the record of eviction conclude him in respect of the title.”<sup>1</sup> And the language in the recent case in Maine which has already been referred to is equally explicit in response to a like objection: “Notice was not necessary to put him in position to enforce such a liability. Without a notice the plaintiff can recover his damages caused by the failure of the title warranted to him. And in this state the costs of the former action and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the damages recoverable. The want of notice of a suit to the warrantor undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the covenantor was notified or not, from the nature of things the burden is on the covenantee to show such items to be reasonable and proper claims where the grantor does not appear in the suits.”<sup>2</sup> While these general principles are supported by the best authorities,<sup>3</sup> there has been an exception in some jurisdictions of the item of counsel fees. They are not allowed in Massachusetts,<sup>4</sup> Mississippi, or Texas,<sup>5</sup> and perhaps in some

<sup>1</sup> *Morris v. Rowan*, 17 N. J. L. 304. *Taylor*, 18 N. H. 220; *Lane v. Fury*,

<sup>2</sup> *Ryerson v. Chapman*, 66 Me. 557. 31 Ohio St. 574; *Harding v. Larkin*.

<sup>3</sup> *Staats v. Ten Eyck*, 3 Cai. 111; 41 Ill. 413; *Keeler v. Wood*, 30 Vt. Pitcher v. Livingston, 4 Johns. 1; 242.

*Robertson v. Lemon*, 2 Bush, 301; <sup>4</sup> *Leffingwell v. Elliot*, 10 Pick. 204.

*Cox v. Strode*, 2 Bibb, 273; *Pitkin v.* <sup>5</sup> *Clark v. Mumford*, 62 Tex. 531, *Leavitt*, 13 Vt. 379; *Kennison v.* 535; *Brooks v. Black*, 63 Miss. 161.



[308] other states.<sup>1</sup> It is difficult to perceive, however, any sound reason for this exception; for, as was said in an early case in Maine,<sup>2</sup> "the plaintiff could not defend without counsel, and if employed they must be paid;" and the same reason that would authorize the recovery of the clerk's, sheriff's and other costs would justify the recovery of reasonable counsel fees. The character of these expenses is the same; one is just as requisite as the other, and both are essential to a defense.<sup>3</sup>

§ 619. **Same subject.** In Illinois the right of recovery is confined to costs incurred in actions in which the warrantee is a party to the record and in which he was evicted. And the rule is said to be limited to the taxable costs and reasonable attorneys' fees in that suit.<sup>4</sup> The covenantee is not entitled to damages on these covenants for any outlays necessitated by the existence or assertion of an invalid adverse claim. The covenant does not protect him against any but lawful claims, which negative the title that the deed to him purports to convey.<sup>5</sup> Nor can the covenantee or his assignee recover for any damages resulting from his own wrongful acts;<sup>6</sup> as where the breach of the covenant consists in a third person having a right of way over a stair-case in the tenement conveyed with warranty, and the plaintiff seeks to recover damages which he has been compelled to pay to such third person for removing the stair-case.<sup>7</sup> In such a case there was a covenant of warranty and against incumbrances. The plaintiff was held entitled to recover damages for the incumbrance only to the date of the removal of the stair-case; and nothing for the damages which he had been adjudged to pay for tearing it down, though the act extinguished the incumbrance.<sup>8</sup> Where an equitable title is conveyed with covenants, and the party having the legal title asserts it in such manner as amounts to an eviction, expenses incurred to procure that title by a suit in equity have been allowed on the same principle as where

<sup>1</sup> *White v. Clack*, 2 Swan, 230. *v. Parsons*, 33 W. Va. 644, quoting See *Holmes v. Sinnickson*, 15 N. J. the text.  
L. 313.

<sup>2</sup> *Swett v. Patrick*, 12 Me. 9.

<sup>3</sup> *Taylor v. Holter*, 1 Mont. 688.

<sup>4</sup> *Harding v. Larkin*, 41 Ill. 413.

<sup>5</sup> *Christy v. Ogle*, 33 Ill. 295; *Smith*

<sup>6</sup> *Wilcox v. Danforth*, 5 Ill. App. 378.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the title undertaken to be conveyed has no equitable or [309] legal foundation, and the paramount title has been procured by the covenantee by purchase. This was held in a recent case in Ohio.<sup>1</sup> A married woman sold real estate, but the acknowledgment of the deed was so defective that the title did not pass. Her heirs, having set up title, and brought suit for possession against one to whom the purchaser had conveyed with the covenants, a proceeding in chancery was successfully prosecuted to a decree for the correction of that defective conveyance, and the suit for possession was defeated by seasonably obtaining that decree. For the expenses incurred in curing that defect an action was brought on the covenant of warranty. The court held that it was not necessary that the paramount title should be established by judgment or decree. And if, under the circumstances existing when the petition to reform was filed, the plaintiff might have bought in the paramount title, and recovered of the covenantor any reasonable amount paid therefor, he might recover from him the costs and expenses, including counsel fees, in both suits; that, looking to the substance as well as the form of the transaction, it was a mode of getting in the legal title. But in a similar case in Iowa<sup>2</sup> the costs were denied because the suit in equity was brought without a previous request to the covenantor to obtain the legal title.

The reformation of a deed so as to include in it and its covenants land which was not originally described therein will not be given retroactive effect so as to make the grantor liable for the expense of defending an action for trespass, upon the land conveyed and included in the reformed instrument, brought by him against the grantee.<sup>3</sup>

## SECTION 5.

### COVENANTS AGAINST INCUMBRANCES.

**§ 620. What are incumbrances.** An incumbrance has been defined to be every right to or interest in the land which may subsist in third persons to the diminution of the value of the

<sup>1</sup> Lane v. Fury, 31 Ohio St. 574.

<sup>3</sup> Butler v. Barnes, 24 Atl. Rep. 328

<sup>2</sup> Yokum v. Thomas, 1 Iowa, 675.

(Conn.).

land, but consistent with the passing of the fee by the convey-  
[310] ance.<sup>1</sup> The cases reported show a great variety of incumbrances, but they may be grouped or classified for the present purpose as incumbrances which consist: 1. Of a judgment, mortgage or some debt or charge that is a lien on the land conveyed. 2. Some right in a third person which may be absolutely or contingently asserted to the title, possession or use of the land conveyed or some part of it, or some privilege or easement thereon; or which imposes in the future some duty or restriction upon the grantee in respect to it.<sup>2</sup>

<sup>1</sup> 2 Greenl. Ev., § 242; Prescott v. Trueman, 4 Mass. 627; Barlow v. McKinley, 24 Iowa, 69; Mitchell v. Warner, 5 Conn. 497; Stambaugh v. Smith, 23 Ohio St. 584; Carter v. Denman, 23 N. J. L. 273; Rawle on Cov. T. 94, 95; Fritz v. Pusey, 31 Minn. 368.

<sup>2</sup> It is said in a recent case: "Incumbrances are of two kinds, viz.: 1, such as affect the title, and 2, those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way, of the latter." Memmert v. McKeen, 112 Pa. St. 315.

Mr. Rawle, in his admirable work on Covenants for Title (4th ed., pp. 96, 97), thus enumerates what have been held to be incumbrances, the existence of which would be a breach of a covenant that the land conveyed is free therefrom: "Thus there can be no doubt that the covenant is broken by the existence of a judgment, a mortgage or any debt which is a lien upon the land conveyed (Bean v. Mayo, 5 Me. 94; Shearer v. Ranger, 22 Pick. 447; Norton v. Babcock, 2 Met. 510; Jones v. Davis, 24 Wis. 229; Case v. Erwin, 18 Mich. 434); a right of dower whether inchoate or consummate by the death of the husband (Shearer v. Ranger, 22 Pick. 447; Bigelow v. Hubbard, 97

Mass. 195; Porter v. Noyes, 2 Me. 26; Donnell v. Thompson, 10 Me. 170; Smith v. Connell, 32 Me. 126; Blanchard v. Blanchard, 48 Me. 177; Runnells v. Webber, 59 Me. 488; Russell v. Perry, 49 N. H. 547; Carter v. Denman, 23 N. J. L. 273; Jeter v. Glenn, 9 Rich. L. 376; Henderson v. Henderson, 13 Mo. 151; Hatcher v. Andrews, 5 Bush, 561; McAlpin v. Woodruff, 11 Ohio St. 120; *contra dicta*, Powell v. Monson Co., 3 Mason, 355); or by the existence of taxes, whether presently due (Almy v. Hunt, 48 Ill. 45; Ingalls v. Cooke, 21 Iowa, 560; Mitchell v. Pillsbury, 5 Wis. 407); or which, when thereafter levied, relate back prior to the conveyance (Hutchins v. Moody, 30 Vt. 655; S. C., 34 id. 433. See Pierce v. Brew, 43 Vt. 292; Rundell v. Lakey, 40 N. Y. 513; Overstreet v. Dobson, 28 Ind. 256; Blossom v. Van Court, 34 Mo. 394; Peters v. Myers, 22 Wis. 602; Long v. Moler, 5 Ohio St. 271; and see, also, Cochran v. Gould, 106 Mass. 29; Carr v. Dooley, 119 Mass. 294; Blackie v. Hudson, 117 Mass. 181; Langsdale v. Nicklaus, 38 Ind. 289); but obviously not taxes which, assessed after the execution of the deed, do not so relate back. Jackson v. Sassaman, 29 Pa. St. 106. So where a testator devised to his daughter the right of living in part of a house, of which the whole was

The vendee's knowledge of the existence of an incumbrance of the first class does not affect his right to recover damages on the breach of the covenant.<sup>1</sup> In some jurisdictions it is presumed that where a servitude imposed upon land is visible and affects only its physical condition, the purchase is made with knowledge of it and the price is determined upon accordingly.<sup>2</sup>

afterwards sold by the residuary devisee, such paramount right was held to be a breach of the covenant against incumbrances made by the latter. *Jarvis v. Buttrick*, 1 Met. 480. So when the premises were sold subject to a covenant that no ardent spirits should be sold therefrom (*Hatcher v. Andrews*, 5 Bush, 561); or to a covenant that a certain fence should be erected or maintained (*Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276. See *Parish v. Whitney*, 3 Gray, 516; *Blain v. Taylor*, 19 Abb. Pr. 228); or to a restriction against building except in a particular way. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) 311. All these have been held to be breaches of the covenant." And on p. 100 the author says: "Again, it has been said that the covenant is broken by the existence of any easements or servitudes to which the land is subject. *Mitchell v. Warner*, 5 Conn. 508 [*Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149; S. C., 118 N. Y. 319]. And as a general proposition this may be also true. Thus, the existence of a paramount private right of way. *Wilson v. Cochran*, 46 Pa. St. 233; *Russ v. Steele*, 40 Vt. 310; *Blake v. Everett*, 1 Allen, 250; *Wetherbee v. Bennett*, 2 Allen, 428. Or, it has been held, of a right of way for a railroad. *Barlow v. McKinley*, 24 Iowa, 70; *Beach v. Miller*, 51 Ill. 206. See, also, *Burk v. Hill*, 48 Ind. 52; *Purcell v. Hannibal*, etc. R. Co., 50 Mo. 504. A right to cut and

maintain a drain. *Smith v. Sprague*, 40 Vt. 43. Or other artificial water-course. *Prescott v. White*, 21 Pick. 341. A right to cut timber or 'wood leave,' as it is sometimes called. *Cathcart v. Bowman*, 5 Pa. St. 319; *Spurr v. Andrew*, 6 Allen, 420. And, in some cases, it is said, by the right to dam up and use the water of a stream running through the land conveyed. *Morgan v. Smith*, 11 Ill. 194; *Ginn v. Hancock*, 31 Me. 42. All these have been held to be incumbrances within the scope of the covenant." So is a right of way over a stair-case in a tenement conveyed. *Wilcox v. Danforth*, 5 Ill. App. 378; *McGowan v. Myers*, 60 Iowa, 256. An incumbrance exists upon property which is subject to assessment for widening a street or for building a sewer from the date of the order to make the improvement. *Blackie v. Hudson*, 117 Mass. 181; *Carr v. Dooley*, 119 id. 294; *Cadmus v. Fagan*, 47 N. J. L. 549, reversing S. C., 46 id. 441; *Barnhart v. Hughes*, 46 Mo. App. 318.

<sup>1</sup> *Barlow v. McKinley*, 24 Iowa, 69; *McGowan v. Myers*, 60 id. 257; *Kellogg v. Malin*, 50 Mo. 496; *Foster v. Foster*, 62 N. H. 532; *Lane v. Richardson*, 104 N. C. 642, 650; *Cathcart v. Bowman*, 5 Pa. St. 317; *Funk v. Voneida*, 11 S. & R. 109.

<sup>2</sup> *Memmert v. McKeen*, 112 Pa. St. 315; *Patterson v. Arthurs*, 9 Watts, 152; *Kutz v. McCune*, 22 Wis. 628; *Smith v. Hughes*, 50 id. 620; *Scribner v. Holmes*, 16 Ind. 142; *Allen v.*



[311] § 621. **A covenant in presenti.** The American covenant against incumbrances in general use is a covenant *in presenti*, that the premises conveyed *are* free and clear of all incumbrances. It is generally treated as a personal covenant, not running with the land, and broken, if at all, the moment it is made, it is thereby turned into a chose in action in the covenantee, and therefore incapable of transmission to his grantee by deed of the premises.<sup>1</sup>

§ 622. **The rule of damages.** Being regarded as a covenant of indemnity, the mere existence of an incumbrance of the first class above mentioned is not ordinarily an actual injury, in the absence of anything done to enforce, or of anything paid by the covenantee to satisfy or extinguish it. In such cases, for the mere technical breach, nominal damages may be recovered, and no more. This was decided at an [312] early day in New York,<sup>2</sup> the court saying: "If he (the covenantee) has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of the incumbrance, on a contingency, where he may never be disturbed by it. This is the reasonable rule; for if he was to recover the value of an outstanding mortgage, the mortgagee might still resort to the mortgagor on his personal obligation, and compel him to pay it; and if the purchaser feels the inconvenience of the existing incumbrance, and the hazard until he is evicted, he may go and

Kersey, 104 id. 1. It is said in a late Wisconsin case that a highway is the only exception. Bennett v. Keehn, 67 Wis. 154, 162. See Messer v. Oestrich, 52 id. 684. That is not admitted to be such in Massachusetts (Kellogg v. Ingersoll, 2 Mass. 101), it seems. This is the rule in Illinois. Wadhams v. Swan, 109 Ill. 46. In New York there is no distinction recognized between incumbrances which affect the title and those simply affecting the physical condition of the land. Huyck v. Andrews, 113 N. Y. 81.

<sup>1</sup> Andrews v. Davison, 17 N. H. 413; Mills v. Saunders, 4 Neb. 190;

Bean v. Mayo, 5 Me. 94; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 id. 17; Delavergne v. Norris, 7 Johns. 358; Hall v. Dean, 13 id. 105; De Forrest v. Leet, 16 id. 122; Stanard v. Eldridge, id. 254; Prescott v. Trueman, 4 Mass. 627; Wyman v. Ballard, 12 id. 304; Garrison v. Sandford, 12 N. J. L. 261; Brooks v. Moody, 25 Ark. 452; Stewart v. Drake, 9 N. J. L. 139; Wadhams v. Swan, 109 Ill. 46. The states in which the rule is otherwise are indicated in § 625, *post*.

<sup>2</sup> Delavergne v. Norris, 7 Johns. 358.

satisfy the mortgage, and then resort to his covenant." This is the settled American rule.<sup>2</sup> It has been applied in Illinois where the incumbrance was a railway across a farm, and was a benefit to the property.<sup>2</sup> But in Missouri it has been held that the damages cannot be reduced by evidence of the enhanced value of the land on account of the road, or of privileges accorded to the land-owner by the railway company; such value not being peculiar to the land in controversy.<sup>3</sup>

Nominal damages may be recovered though the covenantee has not satisfied the incumbrance before action is brought on the covenant.<sup>4</sup> There may be actual injury from the mere existence of a mortgage; and whenever it is actually injurious the covenant affords an indemnity. In a Pennsylvania case the existence of a paramount mortgage having ten years to run gave cause to the creditors of the covenantee to press their demands; he made an assignment, and on the supposition of a sale of the premises to which the covenant related, Duncan, J., said: "The grantee ought to recover all the actual damages he has sustained by the grantor's violation of his covenant because the very sale is the consequence of [313] the incumbrance. If there is a judgment against him for the

<sup>1</sup> Tufts v. Adams, 8 Pick. 547; Harlow v. Thomas, 15 id. 66; Wyman v. Ballard, 12 Mass. 304; Prescott v. Trueman, 4 id. 627; Johnson v. Collins, 116 id. 392; Clark v. Swift, 3 Met. 390; Brooks v. Moody, 20 Pick. 474; Thayer v. Clemence, 22 id. 490; Jenkins v. Hopkins, 8 id. 346; Richardson v. Dorr, 5 Vt. 9; Andrews v. Davison, 17 N. H. 413; Osgood v. Osgood, 39 id. 209; Willson v. Willson, 25 id. 235; Smith v. Jefts, 44 id. 482; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 id. 17; Edgington v. Nix, 49 Mo. 134; St. Louis v. Bissell, 46 id. 157; Bean v. Mayo, 5 Me. 94; Randell v. Mallett, 14 id. 51; Herrick v. Moore, 19 id. 313; Clark v. Perry, 30 id. 151; Reed v. Pierce, 36 id. 455; Runnells v. Webber, 59 id. 488; Mills v. Saunders, 4 Neb. 190; Garrison v. Sandford, 12 N. J. L. 261; Stewart v. Drake, 9 id.

141; Funk v. Voneida, 11 S. & R. 109; Patterson v. Stewart, 6 W. & S. 528; Pitcher v. Livingston, 4 Johns. 1; Hall v. Dean, 13 id. 105; Stånard v. Eldridge, 16 id. 254; Baldwin v. Munn, 2 Wend. 405; Braman v. Bingham, 26 N. Y. 483; Foote v. Burnet, 10 Ohio, 317; Whisler v. Hicks, 5 Blackf. 102; Smith v. Ackerman, id. 541; Pomeroy v. Burnett, 8 id. 142; Brady v. Spurek, 27 Ill. 478; Willets v. Burgess, 34 id. 500; Richard v. Bent, 59 id. 38; Cheney v. City Nat. Bank, 77 id. 562; Davis v. Lyman, 6 Conn. 255; 4 Kent's Com. 471-2; 2 Wash. R. P. 649; Funk v. Creswell, 5 Iowa, 62; Beecher v. Baldwin, 55 Conn. 419; Bradshaw v. Crosby, 151 Mass. 237.

<sup>2</sup> Wadhams v. Swan, 109 Ill. 46.

<sup>3</sup> Kellogg v. Malin, 62 Mo. 429, 432.

<sup>4</sup> Smith v. Jefts, 44 N. H. 482; Beecher v. Baldwin, 55 Conn. 419.

smallest sum, insufficient to condemn his land, by taking in the mortgage, which is a reprisal, if due within seven years, his land is condemned, and sold by means of this very incumbrance; sold for less, *minus* the mortgage money. Is not this an actual damnification to this amount, occasioned by the breach of covenant? If it was a judgment with a stay of execution, and the land sold on a judgment against the grantee, and the judgment against the grantor paid out of the proceeds of the sale, this is a damnification. So here, by the operation of law, a consequential damage arises from the delinquency of the grantor; in reality the plaintiff has sustained every possible damage he can sustain — he can never suffer more. It is the same thing to him as if the land had been sold on the mortgage given by the grantor. The equity of this case is to award to the plaintiff the fair present value of the mortgage.”<sup>1</sup>

In *Braman v. Bingham* <sup>2</sup> the grantor covenanted that the premises were subject to no incumbrances except mortgages to the amount of \$12,400; in fact there were mortgages to the amount of \$12,800. The grantee having paid one of them exceeding \$400 was held entitled to recover that sum with interest, without paying off those remaining, and that he was not confined to nominal damages. The court say, by Selden, J., that “the existence of \$400 of incumbrances in excess of the amount named in the covenant constituted a breach of the covenant, and entitled the plaintiff to nominal damages without having made any payment. Such covenant is broken as soon as made, if ever. When the plaintiff paid the excess of \$400 he became entitled to recover that amount as damages for the breach. By the terms of the covenant it appears to have been contemplated that the lands were to remain, for a time at least, subject to the lien of \$12,400. And it would not be reasonable to require the grantee to pay that sum, as well as the excess, to entitle him to a substantial indemnity for the conceded breach of the defendant’s covenant.”

§ 623. **Same subject.** If the covenantee pays off or pro-[314] cures a discharge of the incumbrance, the amount he fairly and necessarily pays for that purpose, not exceeding, however, the purchase-money and interest from the time of

<sup>1</sup> *Funk v. Voneida*, 11 S. & R. 109.

<sup>2</sup> 26 N. Y. 483.

payment, will be the measure of damages, and may be recovered though such payments may have been made after suit brought on the covenant.<sup>1</sup> The legal ground of action is not a debt or obligation to pay money, but the breach of the covenant. There being such a breach before the action is commenced, it is maintainable for some damages, and any actual loss which results from that breach down to the assessment of damages may be included.<sup>2</sup> But if the action is brought before the covenant is broken, there cannot be a recovery of damages subsequently sustained in the removal of an invalid title, a right of action for which is given by statute.

<sup>1</sup> *Amos v. Cosby*, 74 Ga. 793 (a wife who joins with her husband in conveying a homestead is liable on the covenant against incumbrances); *Johnson v. Collins*, 116 Mass. 392; *Smith v. Carney*, 127 id. 179; *Bradshaw v. Crosby*, 151 id. 237; *Fagan v. Cadmus*, 46 N. J. L. 441; *Collier v. Cowger*, 52 Ark. 322; *Ward v. Ashbrook*, 78 Mo. 515; *Walker v. Deaver*, 79 id. 664; *Lane v. Richardson*, 104 N. C. 642; *Barnhart v. Hughes*, 46 Mo. App. 318; *Kent v. Cantrall*, 14 Ind. 452; *Rardin v. Walpole*, 38 id. 146; *Farnum v. Peterson*, 111 Mass. 148; *Foote v. Burnet*, 10 Ohio, 317; *Stambaugh v. Smith*, 23 Ohio St. 584; *Hall v. Dean*, 13 Johns. 105; *Comings v. Little*, 24 Pick. 266; *Norton v. Babcock*, 2 Met. 516; *Garrison v. Sandford*, 12 N. J. L. 261; *Stoddard v. Gage*, 41 Me. 287; *Brooks v. Moody*, 20 Pick. 474; *Harlow v. Thomas*, 15 id. 66; *Thayer v. Clemence*, 22 id. 490; *Willson v. Willson*, 25 N. H. 229; *Grant v. Tallman*, 20 N. Y. 191; *Chapel v. Bull*, 17 Mass. 213; *Spring v. Chase*, 22 Me. 505; *Reed v. Pierce*, 36 id. 455; *Davis v. Lyman*, 6 Conn. 255; *Wyman v. Bridgen*, 4 Mass. 150; *Wyman v. Ballard*, 12 id. 304; *Tufts v. Adams*, 8 Pick. 547; *Batchelder v. Sturgis*, 3 Cush. 205; *Waldo v. Long*, 7 Johns. 173; *Delavergne v. Norris*, id. 358;

*Stanard v. Eldridge*, 16 id. 254; *Baldwin v. Munn*, 2 Wend. 405; *Stewart v. Drake*, 9 N. J. L. 139; *Funk v. Voneida*, 11 S. & R. 112; *Brown v. Brodhead*, 3 Whart. 104; *Henderson v. Henderson*, 13 Mo. 151; *St. Louis v. Bissell*, 46 id. 160; *Snyder v. Lane*, 10 Ind. 424; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 id. 618; *Eaton v. Tallmage*, 23 id. 502; *McGary v. Hastings*, 39 Cal. 360; *Burk v. Clements*, 16 Ind. 132; *Brandt v. Foster*, 5 Iowa, 287; *Baker v. Corbett*, 28 id. 320. See *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

If the incumbrance is discharged by the grantor expenses claimed by the grantee on account of it will be closely scanned. *Bradshaw v. Crosby*, 151 Mass. 237.

It is not a defense to an action to recover the reasonable expense incurred in discharging an assessment upon property that it was invalid, if the power to re-assess exists. The grantee is not bound to enter into a useless litigation to avoid an assessment. *Coburn v. Litchfield*, 132 Mass. 449.

<sup>2</sup> *Brooks v. Moody*, 20 Pick. 474; *Leffingwell v. Elliott*, 10 id. 204; *Wetmore v. Green*, 11 id. 462; *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford, etc. Ore Co.*, 41 Conn. 112; *Moseley v. Hunter*, 15



The right does not relate back to the institution of a suit brought before the breach.<sup>1</sup>

The covenantee is not obliged to pay off the incumbrance,<sup>2</sup> and if it is suffered to ripen into a title adverse and indefeasible, the measure of damages, on eviction, will be the same as upon a covenant of warranty,<sup>3</sup> and perhaps without actual eviction.<sup>4</sup> It has been held in Iowa that a purchaser who [315] receives a deed containing a covenant against incumbrances from one who derived title by foreclosure of a senior mortgage, but without the junior mortgagee having been made a party to the foreclosure proceedings, may buy in the junior mortgage, if the premises are of such value that he can better afford to pay the amount which it costs and retain them than suffer a redemption and eviction, and should be allowed to recover on the covenant against incumbrances the

Mo. 322; *Kelly v. Low*, 18 Me. 244; *Stambaugh v. Smith*, 23 Ohio St. 584.

<sup>1</sup> *Tibbetts v. Leeson*, 148 Mass. 102. Section 18, chapter 126, Public Statutes of Massachusetts, provides that "whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances when an incumbrance of record appears to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee," etc., for all damages sustained in removing the same. This does not change the rule that the covenant does not run with the land, and is broken, if at all, upon the delivery of the deed. *Kramer v. Carter*, 136 Mass. 504. Nor does it affect the measure of damages. *Bradshaw v. Crosby*, 151 id. 237. It is limited to incumbrances appearing of record in the registry of deeds. *Carter v. Peak*, 138 id. 439. A similar statute exists in Minnesota, and has been held to apply only to incumbrances appearing of record, but not existing in fact. *Hawthorne v. City Bank*, 34 Minn. 382.

<sup>2</sup> The existence of an incumbrance warranted against absolves the purchaser, who may recover a payment made the auctioneer and the expense of examining the title. *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149; S. C., 118 N. Y. 319.

<sup>3</sup> *Stewart v. Drake*, 9 N. J. L. 139; *Jenkins v. Hopkins*, 8 Pick. 346; *Norton v. Babcock*, 2 Met. 510; *Dimmick v. Lockwood*, 10 Wend. 142; *Patterson v. Stewart*, 6 W. & S. 527; *Chapel v. Bull*, 17 Mass. 213; *Monahan v. Smith*, 19 Ohio St. 384; *Smith v. Dixon*, 27 id. 471.

Where the rule prevails that the measure of damages on the breach of the covenant of warranty is the value of the land at the time of eviction, it applies to the breach of the covenant against incumbrances. *Beecher v. Baldwin*, 55 Conn. 419. If the land has depreciated in value equal to the unpaid purchase-money the notes taken to secure the payment thereof may be set off against the damages claimed, although they are barred as independent causes of action. *Ibid.*

<sup>4</sup> *Nichol v. Alexander*, 28 Wis. 118.

amount so fairly paid, notwithstanding he received and retained an interest paramount to the incumbrance of greater value than the amount which he paid for that interest;<sup>1</sup> for purchasers have a right to the benefit of their purchases, and not simply to a return of their money and interest.<sup>2</sup> Referring to the case in which this doctrine was announced,<sup>3</sup> the court, in *Guthrie v. Russell*, says: "This court ignored the doctrine that the consideration paid is to be taken as the value of the property as between the parties. In that case the court aimed to give full compensation, thus following, to some extent, the rule adopted in Massachusetts and some other states, where the limit of recovery in an action for the breach of the covenant is the actual value of the property at the time of the eviction or at the time of extinguishing the incumbrance. Yet we cannot think that the court designed to depart altogether from the other rule above set forth, which is in accordance with the decided weight of authority, and which is expressly held by this court in *Brandt v. Foster*.<sup>4</sup> We have no doubt that if . . . the incumbrance paid off had exceeded the purchase-money and interest, the plaintiff would have been limited in his recovery to that amount." If lands are conveyed by a single deed for an entire consideration actually paid and expressed therein, it cannot be shown that there was a prior parol agreement to the effect that a part of the land conveyed, upon which there was an incumbrance, was granted without consideration.<sup>5</sup> If the estate bargained for is entirely defeated, the purchaser's recovery cannot exceed the purchase-money and interest on it for six years; taxes paid by him cannot be added thereto.<sup>6</sup>

**§ 624. The English and Canadian rule of damages.** In Canada the covenant against incumbrances has been construed and enforced to give substantial damages for the mere existence of incumbrances, as the covenant of seizin is generally in the United States; except that instead of following the analogy of allowing the consideration and interest for want of title, the amount of the incumbrance was held in the court of

<sup>1</sup> *Guthrie v. Russell*, 46 Iowa, 269.

<sup>5</sup> *Bruns v. Schreiber*, 43 Minn. 468.

<sup>2</sup> *Knadler v. Sharp*, 36 Iowa, 232.

See *ante*, § —, n.

<sup>3</sup> *Id.*

<sup>6</sup> *Daggett v. Reas*, 79 Wis. 60.

<sup>4</sup> 5 Iowa, 295.

queen's bench to be the measure of damages without regard [316] to whether it is more or less than the purchase-money.<sup>1</sup> The covenant is there held to run with the land, although the grantor was in fact seized only of an equity of redemption; that it can be sued upon as such by the grantee; and the court of common pleas held that the measure of damages was the difference between the value of the equity of redemption and the indefeasible estate of inheritance contracted and paid for, that difference being represented by the amount for which the mortgage stands as security.<sup>2</sup>

<sup>1</sup> *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

<sup>2</sup> *Empire Gold M. Co. v. Jones*, 19 Up. Can. C. P. 245. A very interesting and instructive opinion on this point was given in this case. The court says: "Upon the question of damages, *Hackett v. Boulton*, 3 C. P. 407, is an express authority that substantial damages are recoverable. *Carlisle v. Orde*, 7 C. P. 456, although there was a bond of indemnity sued upon as well as a covenant, shows, I think, the opinion of Draper, C. J., to have been that substantial damages are recoverable upon the covenant under the circumstances appearing here. The only difference between *Connell v. Boulton*, 25 U. C. 444, and this case, is that there the mortgage was due. It is an authority, also, that substantial damages are recoverable. *Raymond v. Cooper*, 8 C. P. 388, and *Carr v. Roberts*, 5 B. & Ad. 78, were cases of bonds of indemnity. *Lethbridge v. Mytton*, 2 B. & Ad. 772, was a case of a covenant of indemnity, and to pay off a mortgage within a year. Ten years elapsed without its having been paid, and although the mortgage never was enforced, on an action being brought on the covenant, the covenantee was held entitled to recover the full amount of the mortgage, although no damages whatever,

further than what consisted in its mere existence, had been sustained by him. In *Graham v. Baker*, 10 C. P. 426, and *Snider v. Snider*, 13 C. P. 156, the breaches consisted in a simple naked negation of title, and the parties had possession, and no damages by reason of the existence of any incumbrance was stated or suggested. It was treated that the defect of title might have been cured by lapse of time, so that these cases cannot affect the present. There are, however, observations in *Kennedy v. Solomon*, 14 Q. B. at p. 628, in the judgment of the late Chief Justice Sir John Robinson, which give some countenance to the contention of the defendant, that nominal damages only are recoverable here. The observations alluded to are not upon a point upon which the judgment was given, for the judgment was upon the covenant for quiet enjoyment. They related to the covenants for seizin and for good title. There is also a difference between the covenant for right to convey there and here; for here the covenant is specially directed to a right to convey free from incumbrance, so as to assimilate it to a covenant that the premises are free from incumbrances. Moreover, the learned chief justice does not express a decided opinion, but a doubt only. . . . He says,

**§ 625. In some states covenant runs with land.** In [317] several of the states this covenant is held to run with the land for the protection of the owner who suffers actual injury

‘a mortgage or payment is treated in equity not as a matter affecting the title or right to convey, because they hold that the mortgagor or the judgment debtor is, nevertheless, the owner of the estate, and entitled to convey subject, of course, to the incumbrance. In *Townsend v. Champenown*, 1 Y. & J. 449, the court said that in practice, in the master’s office, a mortgage, even though it may be to secure a sum larger than the value of the property, is always treated and considered as matter of conveyance, and not of objection to the title; and I find no authority for holding that it is otherwise regarded at law, though I do not feel confident that when a mortgage in fee has been given by the vendor, before giving the conveyance in which he covenants for title, and where the mortgage money has not been paid, an action might not lie on the covenant for title, and nominal damages be recovered, though the vendee had never been molested by any claim under the mortgage while it was unsatisfied.’ Now, on a bill for specific performance in equity, the reference to the master is to inquire and report whether a good title *can be* made, and when first shown. It is shown by an abstract which must show all the incumbrances; and the abstract is held to be complete, and a good title shown whenever it appears that upon certain acts being done the legal and equitable estates will be in the purchaser; consequently, the appearance of incumbrances on the abstract is no reason why the master should report that a good title cannot be made; nor do they afford sufficient grounds of exception to his re-

port that a good title can be made; for, the court being in possession of what the incumbrances are, before the conveyances come to be made, can and does cause them to be removed, and gives the purchaser ample protection against them. This is the extent of the rule in equity, and the like rule prevails at law in executory contracts, where the contract points to the showing the title and not to the perfecting it in the purchaser, by conveyance. *Savory v. Underwood*, 23 L. T. (Q. B.) 141. But the rule, I apprehend, does not, and indeed cannot, have any application to executed contracts. The court of chancery treats the mortgage as an incumbrance, and causes it to be removed, or makes ample provision for the protection of the purchaser against it; acting upon the principle that the court will not—inasmuch as everything it does is done with a view of perfection—cause conveyances to be executed containing a covenant, which when executed would, *eo instanti*, give to the purchaser an action at law to recover damages in respect of these same incumbrances. True it is that in equity the mortgagor is in a sense deemed to be the owner of the estate, and the mortgage only a pledge and an incumbrance. Treating it as an incumbrance presently existing is sufficient for the purpose of this action; but it is to be added that at law, the mortgagee in fee is regarded in quite a different light. He is seized of the estate; and that being so, the mortgagor *cannot* be. When he then assumes to convey in fee simple or absolute, and covenants for seizin or for good title simply, the



[318] from the incumbrance. It is there held that the covenantee may recover nominal damages for the technical breach which happens at the moment of executing the deed contain-

rule prevailing in equity, upon references to the master on bills for specific performance, can furnish no rule for fixing the measure of damages sustained by reason of the breach of that covenant, short of the protection given by the court of chancery itself, when the conveyance comes to be executed; namely, full protection and indemnity against the incumbrances.

"In *Howell v. Richards*, 11 East, 642, Lord Ellenborough says: 'The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz.: in this case an indefeasible estate in the fee-simple.' Now, if he executes a deed purporting to convey such an estate, when he in fact has only an equity of redemption, the legal estate being in a mortgagee in fee, and covenants that he has such an estate, how can it be said that this covenant is not substantially broken? And if substantially broken, that is, not merely technically, but in substance, how can it be said that the purchaser should be restricted to the recovery of nominal damages only? *Vane v. Lord Barnard*, *Gilb. Eq. 7*, before Lord Chancellor Cowper, has been referred to; but that, in my judgment, rightly understood, is a strong case in support of the recovery of substantial damages in this case. Lord Barnard, on the marriage of his son, entered into articles with trustees, whereby he covenanted to settle certain lands to the usual limitations of marriage settlements; and he covenanted 'that, in such settlement, there shall be covenants that he is seized in fee, has good right to

convey, and that the trustees shall enjoy free from incumbrances.' It happened that these lands were charged by Lord Barnard's own marriage settlement with £6,500, to be paid to such 'daughter, or daughters, as should be living at his death, and not provided for.' A bill was filed against Lord B. for a specific performance of the covenant in his son's articles by Lord B.'s paying off or otherwise giving collateral security against the contingent portion of £6,500. All parties had notice of this charge when Lord B.'s covenant was given. The lord chancellor refused this relief, saying: 'Lord B. has not covenanted that the lands are free from incumbrances, but only that in the settlement he would give specific covenants. Notice or no notice was very material in this case; for, where a covenant is in this manner, if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged even before the sealing of the deed of settlement, because it would be needless to enter into a covenant which, before entering into, is already known to be broken. Now, when you have notice of an incumbrance before executing the articles, you consent with your eyes open to accept the party's covenant against incumbrances you were aware of; and when you have chosen your own security this court will give no other security than by the articles is agreed to, and the rather in this case for that the portion is not a certain incumbrance but a contingent one. It was strongly urged by Mr. Vernon

ing the covenant in consequence of the mere existence [319] of the incumbrance; yet, that this does not arrest the covenant and merge it in a chose in action; that a judgment for such nominal damages does not operate as a bar to [320]

that, supposing these articles were but a covenant *to covenant*, yet as soon as the articles were performed by sealing the deed of settlement, then they might on that day file a bill to enforce specific performance of the covenant.' The lord chancellor said in this case they could not, 'for the incumbrance was not necessary but contingent; and if you brought an action at law upon such a covenant you would not recover two pence until *breach*, which possibly *may never happen*; so relief was refused against this contingent covenant, but was granted in respect of another charge which was present and not contingent.' The reporter adds: 'It seems the portion being *contingent*, and *not certain*, was the reason of this part of the decree, because it is plain by the latter part of the decree where the incumbrance was certain, viz., the payment of a yearly sum, and Lord B. was decreed immediately to discharge it, though by the articles he did but covenant to covenant;' and the report concludes: 'Note the difference between a present covenant that the lands are free from incumbrance and that a man shall execute a deed with covenant that the lands are free, and between a covenant that lands are free and that the trustee shall enjoy the lands free.'

"The portion in this case, it is to be observed, in respect of which the relief was refused, and to which the lord chancellor referred when he said an action at law would not lie, was not a present incumbrance. It had nothing of the character of a '*debitum in presenti solvendum in futuro*.' It depended upon two con-

tingencies whether it would ever become an incumbrance: namely, Lord B. leaving a daughter him surviving, and her not being provided for. The contingency referred to was not whether, admitting the charge to be a present incumbrance, it might or not ever be enforced to the damage of the covenantee, but whether it ever should become a present incumbrance. That this was the view of the lord chancellor is apparent from his decreeing indemnity against the charge which was payable annually, and which was not therefore as yet payable, although by possibility it might never be enforced, to the damage of the covenantee. That was a present incumbrance, *debitum in presenti solvendum in futuro*; and therefore it was decreed to be discharged. The portion, on the contrary, was somewhat of the character of an inchoate right to dower which is not a present charge on the estate, and for which no action lies [see *ante*, § 619, note]. Here the mortgage is a present incumbrance, and the covenant is a present covenant, so that Vane v. Lord Barnard is an authority that substantial damages are recoverable here. But the case of Lock v. Furze, 19 C. B. (N. S.) 119; and in the exchequer chamber, L. R. 1 C. P. 441, conclusively places the principle for estimating the measure of damages upon a sound, firm and rational basis, namely, that there is no difference in this respect between a contract entered into on the sale of real property and on the sale of a chattel. The true measure of damages in both cases is the difference between the

a fresh suit in favor of the covenantee, or even a remote grantee, when, in the time, or during the ownership of either, [321] a substantial injury is sustained; and that for such injury recovery may be had, limited *in maximum* only as is the

value of the thing as it is and as it was warranted to be. The old case of *Gray v. Briscoe*, Noy, 142, is reaffirmed, where the covenant was that the covenantor was seized of Black-acre in fee-simple, when in truth it was copyhold land. The court held the covenant to be broken, and that the plaintiff should recover damages according to the rate that the country values fee-simple more than copyhold. The rule as now settled by *Lock v. Furze*, after a review of all the cases, I take to be this: that as affecting contracts relating to realty, in the case of executory contracts, upon the vendor failing to establish a good title, the vendee shall recover his deposit, if any, and interest, and such reasonable expenses as he has incurred in investigating the title; and in case he has entered into possession, in pursuance of the contract, then perhaps such further sum as he may have reasonably expended on the property in the expectation of the contract being fulfilled. In case the contract has been executed, but no title has passed at all, then, on a covenant for seizin or good right to convey, he shall recover back his principal and interest and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate which has passed and that which the deed purported to convey, and which the grantor covenanted that he had a right to convey. Now to apply this rule to the present case. The deed purported to convey an indefeasible estate of inheritance in fee-

simple, free from incumbrances done or knowingly suffered by the grantor. All that the grantees have in truth obtained is an equity of redemption which is subject to a mortgage which constitutes a present incumbrance, although the moneys secured thereby are payable at future periods. The covenant is broken; the plaintiffs, therefore, have a right to recover in damages the difference between the value of the equity of redemption which they have got, and the indefeasible estate of inheritance which they contracted for and paid for. That difference is represented by the amount for which the mortgage stands as a security, and neither more nor less. A case might no doubt arise, as where the amount secured by the mortgage is made payable at a remote period, and either without interest or at a low rate of interest, in which it might be necessary to make a deduction equivalent to the difference between the value of a present payment of the principal, and payment at the deferred period; but in this case there arises no question of that kind."

See *Mayne on Damages* (2d ed.), 149. This author favors the same view: "There seems to be no difference in principle between a covenant against incumbrances and a covenant to pay them off. If so, the point is decided in England," referring to *Lethbridge v. Mytton*, 2 B. & Ad. 772. He continues: "I conceive that the rule laid down by the court of king's bench is the true one. The damages are not, as Mr. Sedgwick seems to suppose, given in respect to a future

recovery upon the other covenants.<sup>1</sup> This is substantially the rule in Ohio, Indiana, Illinois, Wisconsin, South Carolina and Missouri, except that in the latter no right of action accrues until the vendee has been ousted or has been obliged to extinguish the incumbrance.<sup>2</sup> In most of these states the rule in respect to this covenant is the same that is applied in actions for breach of the covenant of seizin. They are treated as covenants of indemnity against actual damage, arising in the one case from the want of lawful title, and in the other from the assertion of a paramount incumbrance; they run with the land until such damage has actually been sustained.<sup>3</sup>

In *Post v. Campau*,<sup>4</sup> Cooley, J., said: "If all incumbrances were of the same nature, and might be got rid of at the pleasure of the owner of the property incumbered, there would be no difficulty and no wrong in applying to all the same rule. But anything is an incumbrance which constitutes a burden upon the title: a right of way;<sup>5</sup> a condition which may work a forfeiture of the estate;<sup>6</sup> a right to take off timber;<sup>7</sup> a right

contingent loss. They are the proper compensation for an actual and existing loss. The question is: How much is the value of the estate diminished at the moment by the existence of the incumbrances? If interest has to be paid upon them there is a clear loss of annual profit; but suppose the interest is provided for elsewhere, and the estate is merely an ultimate security, still the owner is damnified to the full amount of the incumbrances, if he should wish to sell the estate, or mortgage it, or to charge portions upon it. True, he may not want to do any of these things at present, but as soon as he does want to do them he will undoubtedly fail. It is no satisfaction to a man who has to break off a match, for instance, because he cannot effect a settlement, to be told that he may bring an action and obtain substantial damages. Nor is it any answer to say that he may himself pay off the incumbrance, and then sue; because very likely he may have

no ready money, and be unable to borrow any on account of the incumbered condition of his estate; in short, the American doctrine converts a covenant to pay off incumbrances into a covenant of indemnity against incumbrances, which it is apprehended is a very different thing."

<sup>1</sup> *Eaton v. Lyman*, 30 Wis. 41; *Mecklem v. Blake*, 22 id. 495; *Pillsbury v. Mitchell*, 5 id. 17; *Dickson v. Desire*, 23 Mo. 151; *Foote v. Burnet*, 10 Ohio, 317; *Backus v. McCoy*, 3 id. 211; *Devore v. Sunderland*, 17 id. 60; *Overhiser v. McGollister*, 10 Ind. 41; *McCready v. Brisbane*, 1 N. & McC. 104; *Jeter v. Glenn*, 9 Rich. 376; *Richard v. Bent*, 59 Ill. 38.

<sup>2</sup> *Hunt v. Marsh*, 80 Mo. 396.

<sup>3</sup> *Walker v. Deaver*, 79 Mo. 664; *Mecklem v. Blake*, 22 Wis. 495.

<sup>4</sup> 42 Mich. 90.

<sup>5</sup> *Clark v. Swift*, 3 Met. 390.

<sup>6</sup> *Jenks v. Ward*, 4 Met. 412.

<sup>7</sup> *Cathcart v. Bowman*, 5 Pa. St. 317.



[322] of dower, whether assigned or unassigned.<sup>1</sup> In short, every right or interest in the land, to the diminution of the land, but consistent with the passage of the fee by the conveyance.<sup>2</sup> Some of these are permanent in their nature, and incapable of being removed at the option of the covenantee. They permanently reduce the value of the title conveyed, and this as much at the time of the conveyance as at any future time; and it is therefore reasonable to hold that the covenant against them is broken at once and finally. The covenantee may at once proceed to recover full damages. But when the covenant consists of a money charge, capable of being removed at some time, but which has as yet caused no loss to the covenantee, the doctrine that because the promise of the covenant is technically broken by the existence of the incumbrances [substantial damages may be recovered], must often in its application prove a denial of justice. A covenant may be said to run with the land when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is giving assurance against something which immediately affects the title and causes present damage. Tested by this rule, a covenant against an incumbrance which consists in a right of way would not run with the land; but a covenant against a money charge must attach itself to the title conveyed, and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns whom the incumbrance may eventually damnify.<sup>3</sup> It is only by thus distinguishing between incumbrances that the covenant can have reasonable effect in all cases, and, when the courts thus discriminate, there is no difficulty in giving substantial redress under definite and inflexible rules of law. When the law can be just and also certain, there is no reason why an unjust certainty should be perpetuated. . . . I am of the opinion that the better and only just rule is that a right of action accrues when substantial damage is suffered, and that there may be successive breaches [323] when, by successive acts or occurrences, damage is from time to time suffered as a consequence of the incumbrance."

<sup>1</sup> Runnells v. Webber, 59 Me. 488. Knadler v. Sharp, 36 Iowa, 232;

<sup>2</sup> Prescott v. Trueman, 4 Mass. 627. Richard v. Bent, 59 Ill. 38.

<sup>3</sup> Foote v. Burnet, 10 Ohio, 332;

In Ohio an action is not maintainable for a mere technical breach of the covenant of seizin.<sup>1</sup> But it is there held that the covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; and a right of action thereon immediately accrues to the covenantee at least for nominal damages. In such action, however, more than such damages cannot be recovered, unless the covenantee has removed the incumbrance, or it be shown that his possession has been disturbed, or his use or enjoyment of the land has in some way been interfered with by reason of it.<sup>2</sup> In Illinois the covenants of seizin and against incumbrances are differently expounded. They are thus compared in a late case:<sup>3</sup> "Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages, and all the damages that can result from the breach, have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of choses in action. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary chose in action." And the court further say: "As the doctrine of covenants running with land is an exception to the common-law rule that choses in action are not assignable, why limit its sphere of usefulness and confine it to those covenants which may be broken in the future? May it not as well extend to such as have been only nominally broken at the time of the assignment, and the substantial breach occurs afterwards, and the whole damages are sustained by [324] the assignee? It does not appear to be a sufficient answer that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in

<sup>1</sup> See Ohio cases just cited, and *Stambaugh v. Smith*, 23 Ohio St. 584.

<sup>2</sup> *Stambaugh v. Smith*, *supra*.

<sup>3</sup> *Richard v. Bent*, 59 Ill. 38.

the name of the assignor for his use. This is a cumbrous form of remedy, and the remedy is liable to be embarrassed. In the case in hand such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy, . . . and to establish the right of action in such assignee might be a serious inconvenience. If it be held that the real cause of action on such a covenant accrues immediately upon the making of the deed, it would seem that the statute of limitations would then commence to run when the breach was only formal and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterwards, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises and the substantial breach takes place, the statute of limitations may have run against the action. In the state of the authorities, not feeling embarrassed by any former decision of our own upon that point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form [in the name of the assignee of the covenant] for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule only in supposed obedience to the strict common-law rule."

§ 626. **Criticism of the rule of damages.** It appears to be assumed very generally in this country that the mere existence of a money incumbrance upon land is no injury to a purchaser; that unless the incumbrance has been asserted, or the covenantee has paid something to extinguish it, there is a mere technical breach for which only nominal damages should be allowed, and only grudgingly conceded to be a right of action;<sup>1</sup> that it would be unjust to allow the covenantee, who may never be disturbed by the incumbrance, to recover the amount for which it is security from the covenantor, for the lien is only collateral to a personal obligation which might still be [325] enforced against the covenantor; and to permit such a recovery would not only expose him to the danger of being called upon to pay the debt a second time, but would give the covenantee a certain compensation for an uncertain and con-

<sup>1</sup>See *Richard v. Bent*, 59 Ill. 38.

tingent loss. To avoid this supposed injustice the general course of decision in this country has been to deny the covenantee more than nominal damages for the mere existence of a money incumbrance covenanted against, or to oblige him to extinguish it; or else to treat the covenant as a continuing one in favor of the owner, who may pay it or be foreclosed by it—even by a remote grantee who has been denominated “the last purchaser and the first sufferer.” This view is so firmly fixed in our jurisprudence that it is probably idle to question or criticise it; but it may be remarked that the rules on this subject are not modified when the mortgage or other incumbrance is not collateral to any personal obligation of the covenantor. No exception is made where there is no such obligation, or where the incumbrance is created by some former owner. Where it is actually security for the covenantor’s personal obligation, as payment pending the suit entitles the covenantee, as plaintiff, to increase his damages by the amount paid, there is no sound reason for requiring him to advance the money for that purpose, since a payment of the incumbrance by the party whose covenant is broken after suit brought on the covenant against him would certainly go in mitigation and avert the danger of a second recovery. Nor is it true that the recovery of substantial damages for the mere existence of an incumbrance on premises sold and warranted to be unincumbered is obnoxious to the objection of allowing a certain compensation for a contingent loss. This is affirmed by a preponderance of authority in respect to the covenant of seizin which is of the same nature. The existence in a third person of a paramount title justifies a full recovery as for want of that title. But it is said the covenant against incumbrances is one of indemnity. True; but it is so as a consequence of this rule of damages. Why should it be deemed more a covenant of that description than any other in a deed? It is designed for the same general purpose, to assure to a purchaser the full benefit of his purchase. While the incumbrance exists the granted premises are diminished in market [326] value to the amount of it. The purchaser to that extent fails to obtain the fruits of his purchase; to that extent the seller has purchase-money for which he has not fulfilled, as contemplated, the contract of sale. An incumbrance is deemed in



other cases to produce real injury if its existence impairs the market value of the land; for, universally, incumbered land is estimated at a value reduced by the amount of the incumbrance for all the purposes of ownership. The right of recovery on this covenant for the existence of an easement or any permanent incumbrance is commensurate with this reduction of value. The fact that an estate can be sold is one of its elements of value, and is not to be excluded from consideration.<sup>1</sup>

If this covenant is held to run with the land it will pass by a deed without covenants — by even an execution sale. On what hypothesis is the last purchaser the first sufferer? Only on the supposition that he has bought the premises as unincumbered and paid full value. Then, if he has purchased without covenants, it may be just to allow him the benefit of the covenant to his grantor, who would, in the case supposed, have no occasion to avail himself of it; but the first sufferer would then be saved from loss only by the provident caution of his grantor. But if, as is presumably the case more frequently, the land is sold with a knowledge of the incumbrance, and without any covenant against it, the purchaser buys at a price reduced on account of the incumbrance, and the reduction of the price is equal to or greater than the amount which must be paid to disincumber the title. In that case, if the purchaser has the benefit of the covenant, he may discharge the incumbrance and reimburse himself by a suit on the covenant against the original grantor, and thus obtain a clear title for a price reduced by reason of an incumbrance which costs him nothing to remove.

§ 627. **Damages where incumbrance permanent.** Incumbrances of the second class are not removable at the will of the seller or purchaser; and when the covenant is broken by [327] the existence of such an incumbrance, recovery, proportioned to the actual injury, may be had in an action brought at once; and if no actual injury can be inferred, or is not proved, nominal damages only can be recovered. The inquiry in such cases, adapted to the particular circumstances, is, what is the injury naturally and proximately resulting from the existence of the incumbrance to the purchaser.<sup>2</sup> For the exist-

<sup>1</sup> *Wetherbee v. Bennett*, 2 Allen, 428. *Myers v. Munson*, 65 Iowa, 423; *Kel-*

<sup>2</sup> *Bronson v. Coffin*, 108 Mass. 175; *logg v. Malin*, 50 Mo. 496; S. C., 62 id.

ence of a mere inchoate right of dower only nominal damages can be given, for during the life of the husband it is uncertain that any loss will ever occur; and so, if the right is consummated by the death of the husband, so long as the dower has not been assigned; for the widow may never procure an assignment of it.<sup>1</sup> It was held in an early Massachusetts case<sup>2</sup> that the existence of a paramount right to the premises was an incumbrance; that if the plaintiff had not extinguished the right, and it still remained against the title, he could only recover nominal damages; but if he had, at a just and reasonable price, extinguished such paramount title, so that it could never afterwards prejudice the grantor, the price so paid would be the measure of damages.<sup>3</sup> Where the incumbrance was a right of way over the granted land for the purpose of taking water from a spring situated on it, the covenantee was held entitled to just compensation for the real injury resulting from the continuance of the easement.<sup>4</sup> Just compensation in such case has generally been estimated by the amount which the existence of the easement reduces the market value of the land.<sup>5</sup> Though the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and the right had been extinguished without any expense, the court refused to instruct the jury to return a verdict for nominal damages only. It was held not to [328] follow from these facts that there was no actual damage. While the right of way lasted the plaintiff was precluded from using the part of the land covered by the way as fully as he otherwise might have done. He could not set a tree, or a post, or a building upon it; or inclose or cultivate it; or sell or lease it to any person to whom such an incumbrance would

429; *Barlow v. McKinley*, 24 Iowa, 69; *Beach v. Miller*, 51 Ill. 206; *Butler v. Gale*, 27 Vt. 739; *Van Wagner v. Van Norstrand*, 19 Iowa, 427; *Prescott v. Trueman*, 4 Mass. 627; *Batchelder v. Sturgis*, 3 Cush. 205; *Hubbard v. Norton*, 10 Conn. 422; *Harlow v. Thomas*, 15 Pick. 66; *Giles v. Dugro*, 1 Duer. 335; *Willson v. Willson*, 25 N. H. 229; *Chapel v. Bull*, 17 Mass. 212; *Greene v. Creighton*, 7 R. I. 1.

<sup>1</sup> *Hazelrig v. Hutson*, 18 Ind. 481; *Sheafe v. O'Neil*, 9 Mass. 13; *Runnells v. Webber*, 59 Me. 488.

<sup>2</sup> *Prescott v. Trueman*, 4 Mass. 627.

<sup>3</sup> *Ward v. Ashbrook*, 78 Mo. 515.

<sup>4</sup> *Harlow v. Thomas*, 15 Pick. 66.

<sup>5</sup> *Giles v. Dugro*, 1 Duer. 331; *Kellogg v. Malin*, 62 Mo. 429; *Williamson v. Hall*, id. 405; *Mitchell v. Stanley*, 44 Conn. 312.

be objectionable. It was an apparently permanent subtraction from the substance of the estate. The court approved of the instruction that the plaintiff was entitled to just compensation for the real injury resulting to the estate in its market value from the incumbrance.<sup>1</sup> And this measure of compensation cannot be modified by showing that, notwithstanding the incumbrance, the premises are susceptible of some of the beneficial uses incident to ownership; nor can it be enhanced by showing special injury from the incumbrance by reason of some special use the purchaser intended to make of the premises, but which was not communicated to the seller and did not form the basis of the contract of purchase.<sup>2</sup> The probability that a restriction concerning the use to which land may be put will not be enforced has been held competent evidence on the question of the warrantee's damage.<sup>3</sup>

§ 628. *Same subject.* In a case where the incumbrance consisted of a prior grant of timber growing on a farm, with the privilege of entering to cut it during a future term, it was held that the covenant was broken as soon as made, and that the measure of just compensation was the value of the timber for the purposes of the farm at the time of the grant.<sup>4</sup>

<sup>1</sup> *Wetherbee v. Bennett*, 2 Allen, 428; *Foster v. Foster*, 62 N. H. 46; *Smith v. Davis*, 44 Kan. 362.

<sup>2</sup> *Id.*; *Batchelder v. Sturgis*, 3 Cush. 201; *Kellogg v. Malin*, 62 Mo. 429.

<sup>3</sup> *Foster v. Foster*, 62 N. H. 532.

<sup>4</sup> *Catheart v. Bowman*, 5 Pa. St. 217.

In a recent case there was an incumbrance on an eighth fractional part of the land conveyed, consisting of the grant of the right to enter and cut all the "saw-timber." The damage was measured by the diminished value of the whole tract — the difference between its value if the title were good and its value as depreciated by the incumbrance. The writer of the opinion observed: "We readily perceive that a strong argument can be made in favor of the view that the recovery ought to be limited to the amount which would have been recovered if the entire title of the in-

cumbered portion had failed; for it would seem in this case that the plaintiff ought not to recover more damages for the sale by the defendant of the timber on the forty acres than he would for the sale of the fee-simple interest in it. So, on the other hand, it could be urged with equal force that the damages would be the same, ordinarily, whether the trees were cut from a part of the land or miscellaneously from all parts, provided the number and kind of trees cut were in each case the same. Making choice between two difficulties, we prefer to adopt the simpler and more convenient rule, which, as we have said, is to compensate the plaintiff for the estimated diminution in value of his entire tract of land by reason of the incumbrance from the time of the breach of the covenant with interest and costs of suit, not, however,

In another case the incumbrance was an existing contract running with the land to fence a railroad passing through the premises, and it was held that the inquiry in respect to damages was how much the land charged with the obligation of maintaining the fence was affected by that obligation; in other words, how far the existence of that incumbrance impaired the value of the estate to the owner, and what would be the difference in its fair market value by reason of its existence.<sup>1</sup> An outstanding lease may be an incumbrance, and when it is and there is a suspension of the covenantee's enjoyment [329] during its continuance, the annual value or the interest on the purchase-money has been allowed for that time as damages;<sup>2</sup> and in other cases the fair rental value of the land to the expiration of the term.<sup>3</sup> Where the incumbrance is a life estate its value for the time the purchaser is kept out of its enjoyment is the rule of damages;<sup>4</sup> and, as has already been said, the duration of a life may be determined by life tables.<sup>5</sup> The grantee of land on which is a party-wall built by the mutual agreement of his grantor and the latter's co-owner and at their joint cost must have his damage assessed with reference to his rights in the easement on the land of such co-owner, and in view of the whole of the original agreement.<sup>6</sup>

If the covenantee extinguishes an incumbrance of this class, the amount which he fairly and reasonably pays for that purpose will be the measure of damages.<sup>7</sup> He must show that the sum paid was reasonable, and otherwise than by proving the fact that he paid it.<sup>8</sup>

**§ 629. Liability of remote covenantor.** Where the property conveyed is incumbered with a perpetual easement the

to exceed the purchase-money paid for the whole tract with interest." Iowa, 422; *Grace v. Scarborough*, 2 Spear, 649.

*Clark v. Zeigler*, 79 Ala. 346, 350; S. C., 85 id. 154.

<sup>1</sup> *Bronson v. Coffin*, 108 Mass. 175; S. C., 118 id. 156; *Burbanks v. Pillsbury*, 48 N. H. 475.

<sup>2</sup> *Rickert v. Snyder*, 9 Wend. 416.

<sup>3</sup> *Porter v. Bradley*, 7 R. I. 542; *Fritz v. Pusey*, 31 Minn. 368. Compare *Batchelder v. Sturgis*, 3 Cush. 201. See *Van Wagner v. Van Nostrand*, 19

<sup>4</sup> *Tierney v. Whiting*, 2 Colo. 620; *Christy v. Ogle*, 33 Ill. 295.

<sup>5</sup> *Mills v. Catlin*, 22 Vt. 106; vol. 1, § 455.

<sup>6</sup> *Mackey v. Harmon*, 34 Minn. 168.

<sup>7</sup> *Chapel v. Bull*, 17 Mass. 213;

*Mitchell v. Hazen*, 4 Conn. 495.

<sup>8</sup> *Anderson v. Knox*, 20 Ala. 156; *St. Louis v. Bissell*, 46 Mo. 157; *Dickson v. Desire*, 23 Mo. 151, 167.



liability of a remote covenantor is not necessarily the same as that of a subsequent one. The original vendee had a right of action before he conveyed.<sup>1</sup> His rights as against his grantor depended upon the effect of the easement on the market value of the property at the time of the breach and interest on the amount of the depreciation resulting.<sup>2</sup> The rights of the second grantee as against his grantor would be affected by the conditions existing when his right of action accrued. The first grantor is not liable for attorneys' fees paid by a subsequent grantor in defense of an action against him on his covenant.<sup>3</sup>

§ 630. **Where covenant is connected with that for quiet enjoyment.** The covenant against incumbrances in use in England, and to some extent also in this country, is connected with the covenant for quiet enjoyment, and is to the effect that the grantee shall enjoy the premises free of incumbrances. It is not broken by the mere existence of an incumbrance, and hence there can be no recovery of nominal damages based upon that fact. It assures the purchaser against disturbance in the future by means of any incumbrance, and hence runs with the land.<sup>4</sup>

§ 631. **Covenant to pay incumbrances.** Another form of covenant relating to incumbrances is that to pay and discharge them. This form usually relates to some pecuniary lien or charge on the land which the covenantor has the right to remove by payment. If he neglects to perform within the [330] time fixed therefor, the covenantee, without having paid anything to extinguish the lien, is entitled to recover, by the uniform course of decision, the present amount of the incumbrance.<sup>5</sup> But if the mortgage has been paid out of the

<sup>1</sup> *Myers v. Munson*, 65 Iowa, 423.

<sup>5</sup> *Williams v. Fowle*, 132 Mass. 385;

<sup>2</sup> *Id.*; *Huyck v. Andrews*, 113 N. Y. 81; approved in *Hymes v. Esty*, 133 id. 342.

*Locke v. Homer*, 131 id. 93; *Reed v. Paul*, id. 129; *Shanahan v. Perry*, 130 id. 460; *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Carr v. Roberts*, 5 id. 78;

<sup>3</sup> *Myers v. Munson*, *supra*.  
<sup>4</sup> See *Martin v. Barber*, 5 Blackf. 232; *Hutchins v. Moody*, 30 Vt. 658; *Carter v. Denman*, 23 N. J. L. 260; *Grace v. Scarborough*, 2 Spear, 652; *Greene v. Creighton*, 7 R. I. 1; *Jeter v. Glenn*, 9 Rich. L. 374; *Rawle on Cov.* (4th ed.) 89, 90.

*Gardner v. Niles*, 16 Me. 279; *Gennings v. Norton*, 35 id. 308; *Booth v. Starr*, 1 Conn. 249; *Lathrop v. Atwood*, 21 id. 123; *Dorsey v. Dashiell*, 6 Md. 204; *Hogan v. Calvert*, 21 Ala. 199; *Ardesco Oil Co. v. North American O. & M. Co.*, 66 Pa. St. 381;

land or extinguished by the act of the mortgagee only nominal damages can be recovered.<sup>1</sup> If the grantor in a warranty deed gives his grantee a bond conditioned for the satisfaction of a mortgage on the land conveyed the bond is a security independent of the deed. If the title is lost by foreclosure the damage will be the consideration paid and interest on it from the time of eviction.<sup>2</sup> The grantee may have his obligations for the unpaid purchase-money canceled.<sup>3</sup> The damage resulting from the breach of such a covenant may be liquidated in advance.<sup>4</sup>

There is a difference between a contract to discharge or acquit from a debt and one to discharge or acquit from the damage by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract though the plaintiff has not paid it. But if it be to discharge or acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless.<sup>5</sup> If, however, it affirmatively appears that the promisees were not liable, and had no personal debit relations with the creditor, if such promisees can recover at all they can only recover what they have lost by the default. This is the general rule of damages, to which the cases giving the debtor damages to the amount of his debt, against one who agrees to pay it, are exceptions, resting on special reasons.<sup>6</sup> When the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is its sole object, and where, in consequence of the prior liability of other persons, no actual loss may be sustained, the decisions, though not heretofore altogether harmonious, have gradually inclined

Scobey v. Finton, 39 Ind. 275; Manahan v. Smith, 19 Ohio St. 384; Gilbert v. Wiman, 1 N. Y. 550; Ex parte Negus, 7 Wend. 499; Webb v. Pond, 19 id. 423. See Wetmore v. Green, 11 Pick. 462; Young v. Stone, 4 W. & S. 45.

<sup>1</sup> Muhlig v. Fiske, 131 Mass. 110.

<sup>2</sup> Howell v. Moores, 127 Ill. 167; Chinn v. Wagoner, 26 Mo. App. 678.

<sup>3</sup> Chinn v. Wagoner, *supra*.

<sup>4</sup> Fasler v. Beard, 39 Minn. 32.

<sup>5</sup> 1 Saunders, 117, note 1; Booth v. Starr, 1 Conn. 244, 250; Munn v. Eckford, 15 Wend. 502; Keep v. Brigham, 6 Johns. 158; Thomas v. Allen, 1 Hill, 145; Rockfeller v. Donnelly, 8 Cow. 623; Chace v. Hinman, 8 Wend. 452.

<sup>6</sup> Pratt v. Bates, 40 Mich. 37.

to the allowance of actual compensation measured by the full amount of the liability which the defendant undertook to pay.<sup>1</sup>

## SECTION 6.

### DEFENSES AND CROSS-CLAIMS AGAINST PURCHASE-MONEY.

[331] § 632. **Diversity of decisions.** Independently of the provisions of the modern code regulating counter-claims, there has not been much uniformity of practice in respect to defenses which may be made in actions for purchase-money. In some states this defense, in actions upon contract, has been permitted, to some extent, under the name of failure of consideration, and in others under the name of discount or recoupment. This general subject has been considered as a separate topic;<sup>2</sup> now we will briefly refer to the practice relative to allowing the damages for breach of these covenants as a full or partial defense in actions at law and suits in equity for the purchase-money. Where there is a right to substantial damages for the breach of any covenant in a deed, and these are presently recoverable from the party to whom unpaid purchase-money is payable, it prevents circuity and multiplicity of actions to permit both claims to be proved, and to compensate each other in one action.

§ 633. **The New York rule.** In an early case in New York<sup>3</sup> the defense of a defect of title, without eviction, was allowed, although the essential conditions did not exist for the recovery of damages on the covenants in the deed. For this reason the case, upon this point, was afterwards overruled<sup>4</sup> and has been generally disapproved. In the later case

<sup>1</sup> *Id.*; *Hodgson v. Bell*, 7 T. R. 97; *Devol v. McIntosh*, 23 Ind. 529; *Johnson v. Britton*, *id.* 105; *Scobey v. Finton*, 39 *id.* 275; *Warwick v. Richardson*, 10 M. & W. 284; *Sparkes v. Martindale*, 8 East, 593; *Ross v. Pye*, *Yelv.* 207; *Wood v. Wade*, 2 Stark. 167; *Thomas v. Allen*, 1 Hill, 145; *Holmes v. Rhodes*, 1 B. & P. 638; *Post v. Jackson*, 17 Johns. 239; *Churchill v. Hunt*, 3 Denio, 321; *Farquhar v.*

*Morris*, 7 T. R. 124; *Smith v. Pond*, 11 Gray, 234; *Stewart v. Clark*, 11 Met. 384. See *Stephens v. Boulton*, 23 Up. Can. Q. B. 16.

<sup>2</sup> Vol. 1, § 168 *et seq.*

<sup>3</sup> *Frisbie v. Hoffnagle*, 11 Johns. 50.

<sup>4</sup> *Vibbard v. Johnson*, 19 Johns. 77; *Lattin v. Vail*, 17 Wend. 188; *Whitney v. Lewis*, 21 *id.* 131; *Tallmadge v. Wallis*, 25 *id.* 107; *Lamerson v. Marvin*, 8 Barb. 14.

of Tallmadge v. Wallis,<sup>1</sup> there was a breach of the covenant of seizin, and based upon it was a plea of a total want of consideration in bar of an action upon a bond for purchase-money. The plea was held bad on demurrer because there was no allegation that the defendant "obtained no estate or interest whatever under the conveyance;" for in the absence of [332] an allegation to the contrary it would be presumed that he obtained possession of the premises, and therefore that there was not an entire want of consideration. There can be no inference that possession delivered by a seller having no title is a benefit conferred by the conveyance, if so recent that the superior owner can recover *mesne* profits for the whole time it was enjoyed; hence the judgment on the demurrer in that case indicates that in New York recovery of full damages, measured by the consideration money, cannot be had for breach of the covenant of seizin if the covenantor received possession and has not been evicted. It is true, however, that if possession for which the party receiving and enjoying it will be liable to a third person as superior owner is of any value, there is not in fact an entire want of consideration. But in a legal sense, in view of the rules for measuring damages for breach of the covenants for title, such a possession is of no appreciable value as a benefit moving from the grantor, because, for all that it is deemed to be legally worth, he is held liable to the superior owner, and during the period of such liability he is not treated as receiving any benefit under the conveyance from the covenantor, nor is he charged with any such benefit in reduction of damages, otherwise recoverable, in any action for the breach of those covenants. The opinion in this case favors the allowance against purchase-money upon proper pleading of all damages which are recoverable for breaches of the covenants in the deed.<sup>2</sup> The chancellor referred to the cases which had established in that state the right of recoupment for partial failure of consideration, and said, as there was a total failure, the defendants, *therefore*, instead of pleading in bar of the action, should have pleaded the general issue *non est factum*, and given notice with such plea of the *partial* failure of title for the purpose of reducing

<sup>1</sup> 25 Wend. 107.

<sup>2</sup> See, also, Bush v. Marshall, 6 How. Pr. 284; Curtiss v. Bush, 39 Barb. 661.



the amount to be recovered upon the bond. In more recent cases in that state, to actions to foreclose purchase-money mortgages the defense of a partial failure of title was attempted, the deeds containing the covenants of seizin and warranty. The court held the defense inadmissible because there had been no eviction or disturbance of the defendant's [333] possession; that as to the right of such a defense there was no difference between a breach of the covenant of seizin and one of the covenant of warranty.<sup>1</sup>

§ 634. **Alabama rule.** In Alabama there would seem to be no right of recoupment of damages at law for breach of the covenants in actions for purchase-money. The reason assigned is that a court of law cannot do complete justice between the parties.<sup>2</sup> Goldthwaite, J., said: "Such a defense, whatever be its merits, cannot be called a failure of consideration for which the notes were given; because, if there were no warranty whatever, the defendant would be without any remedy. It follows that if he is now entitled to any remedy it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable. Without stopping now to inquire whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defense, even in a case where the recovery on the covenant of warranty ought to be equal or larger than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on the covenant of warranty are in their nature unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White*; <sup>3</sup> secondly, the covenant of warranty would not be extinguished by this defense; thirdly, the covenant itself operates as an estoppel to the grantor and would have the effect to transfer to the purchaser or his assigns any subsequently acquired title which should be vested in the grantor; fourthly, by the conveyance all the covenants running with the land

<sup>1</sup> *Farnham v. Hotchkiss*, 2 Keyes, 9;      <sup>2</sup> *Bliss v. Smith*, 1 Ala. 273; *Cullum*  
*Parkinson v. Sherman*, 74 N. Y. 88;      *v. Branch Bank*, 4 Ala. 21.  
*Ryerson v. Willis*, 81 id. 277.      <sup>3</sup> 1 Ala. 645.  
*Parkinson v. Jacobson*, 13 Hun, 317.

are *ipso facto* assigned to the purchaser." If the purchaser accept a deed with warranty he cannot set up either fraud or failure of consideration at law as a defense to an action upon notes given for purchase-money.<sup>1</sup> If, however, the deed [334] of a trustee is void because the authority given him by the statute has not been pursued, the vendee may resist the recovery of the purchase-money, although he has not been evicted.<sup>2</sup>

§ 635. **Mississippi rule.** In Mississippi Yerger, J., said in a case decided in 1852:<sup>3</sup> "Upon examining the various cases decided in that state in relation to the relief which a vendee of lands is entitled to receive on account of the failure or defect of title the following rules are clearly established: First, where a contract for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty, and taken possession of the land, he cannot in a case free from fraud or misrepresentation avoid a judgment for purchase-money, either at law or in equity, on account of a defect or a failure of title unless he has been evicted. Second, if there has been fraud or misrepresentation in relation to the validity of the title, or the absence of incumbrance on it, a court of law or equity, if the title be defective or incumbered, will relieve from payment of the purchase-money without eviction, notwithstanding a party may have received a deed with covenants of general warranty and gone into possession of the land. Third, where the vendee, at the time of his pur-

<sup>1</sup>Starke v. Hill, 6 Ala. 785; Tankersly v. Graham, 8 id. 247; Cole v. Justices, id. 793; Knight v. Turner, 11 id. 636; McLemore v. Mabson, 20 id. 139; Patton v. England, 15 id. 69; Peden v. Moore, 1 Stew. & P. 81; Homer v. Purser, 20 Ala. 573; Thompson v. Christian, 28 id. 399; Helvenstein v. Higgason, 35 id. 259; Andrews v. McCoy, 8 id. 9:0.

<sup>2</sup>Wiley v. White, 3 Stew. & P. 355.

It is said in Hickson v. Lingold, 47 Ala. 449, an action by an executor on a note given for the purchase-money of land sold by him, that the principle to be extracted from the cases

then ruled in that state "is that where the vendee is in the possession of the property purchased he cannot successfully resist and defeat an action for the purchase-money on the ground that the vendor's title is defective, or that he had no legal authority to make the sale, or that the sale was void. In other words, that it is inequitable to permit the vendee to retain the property purchased and not pay for it." The case of Wiley v. White, *supra*, is not noticed by the court.

<sup>3</sup>Wailes v. Cooper, 24 Miss. 208.

chase, knew of the defect of title, or the existence of incumbrances on the estate, and took a deed with covenants of warranty, he cannot at law avoid a recovery even after eviction, but must rely upon the covenant. Nor will a court of chancery, in such a case, as a general rule, grant any relief, but will remit the party to his covenants, such being the remedy provided for himself." In a later case<sup>1</sup> the court say: "It has been repeatedly decided by learned and able judges in this country, not in virtue of any statutory provision, but upon principles of justice and convenience, and with a view of preventing litigation and expense, that where fraud has occurred in obtaining, or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense, when sued upon such contract, in all cases where the title to real estate is not involved; and that he shall not be driven to assert them [335] either for protection or as a ground for compensation in a cross-action. And although there is some diversity of judicial opinion upon the subject, it is believed to be the better opinion that this defense cannot, in general, be made where the partial failure relates to title to real estate merely; and this is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate in causing it to be perfected, and upon the further consideration that the vendee in general sustains no injury by a partial defect of title, so long as he retains possession, as also because it would be without the principle upon which recoupment is allowed in the common-law courts, inasmuch as, for want of that peculiar jurisdiction of the equity courts to cause defective titles to be perfected, they could not do final and complete justice in the premises, and terminate all further litigation touching the contract."<sup>2</sup>

<sup>1</sup> *Myers v. Estell*, 47 Miss. 4.

<sup>2</sup> See *Laughman v. Thompson*, 6 Sm. & M. 259; *Chaplain v. Briscoe*, 5 id. 198; *Kilpatrick v. Dye*, 4 id. 289; *Willey v. Hightower*, 6 id. 345; *Hoy v. Taliaferro*, 8 id. 727; *Vick v. Percy*, 7 id. 256; *Stone v. Buckner*, 12 id. 73;

*Duncan v. Lane*, 8 id. 744; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Puckett v. McDonald*, 6 id. 269; *Winstead v. Davis*, 40 Miss. 785; *Heath v. Newman*, 11 Sm. & M. 201; *Glenn v. Thistle*, 23 Miss. 42; *Miller v. Lamar*, 43 id. 383; *Wofford v. Ashcraft*, 47

§ 636. **Rule in Tennessee, Michigan, Arkansas, Virginia, Illinois, Florida, Maine, Massachusetts and Missouri.** In Tennessee, Arkansas, Michigan, Virginia, and Illinois, a purchaser may avail himself of eviction or other breach of the covenants for which he is entitled to substantial damages as a full or partial defense to an action for purchase-money.<sup>1</sup> In Florida<sup>2</sup> it has been held that in an action upon a note for purchase-money of land an equity existing in a third person is not sufficient to sustain a plea of failure of consideration. A mere equity in another person is no defense at law; there must be fraud or eviction, or something equivalent thereto, or admitted or unquestionable paramount title. In Maine it appears to be settled that there can be no defense at law against the collection of a purchase-money note on the ground of a partial failure of title.<sup>3</sup> And it has been so held [336] also in Massachusetts.<sup>4</sup> In Missouri a vendee in possession under covenants of warranty cannot set up a want or failure of consideration. But if the deed conveys an unknown, uncertain and undetermined interest, a total failure of consideration may be shown.<sup>5</sup>

§ 637. **South Carolina rule.** In South Carolina the [339] covenant of warranty includes the covenant of seizin, and therefore a breach does not depend on an eviction.<sup>6</sup> Formerly there were three classes of cases in which a purchaser

id. 641; *Ware v. Houghton*, 41 id. 382; *Feemster v. May*, 13 Sm. & M. 275.

In *Turner v. McAdory*, 58 Miss. 27, there was a breach of the warranty by the establishment of a paramount title, which the warrantee purchased. It was held that a court of law could not order the judgment obtained by the warrantor on the purchase-money notes to be credited with the amount paid by the warrantee for such purpose, the claim not being reduced to judgment against the warrantor.

<sup>1</sup> *Edmunds v. Porter*, 2 Cold. 42; *Walker v. Johnson*, 13 Ark. 522; *Griggs v. D. & M. R. Co.*, 10 Mich. 117; *Redding v. Lamb*, 81 id. 318, 331; *McDaniel v. Grace*, 15 Ark. 489;

*Slack v. McLagan*, 15 Ill. 242; *Knapp v. Lee*, 3 Pick. 459; *Rice v. Goddard*, 14 Pick. 293; *Pence v. Huston*, 6 Gratt. 304; *Doremus v. Bond*, 8 Blackf. 368; *Morgan v. Smith*, 11 Ill. 194, 200; *Schuchmann v. Knoebel*, 27 Ill. 175.

<sup>2</sup> *Long v. Allen*, 2 Fla. 402.

<sup>3</sup> *Lloyd v. Jewell*, 1 Me. 352; *Wentworth v. Goodwin*, 21 id. 154; *Jenness v. Parker*, 24 id. 294; *Herbert v. Ford*, 29 id. 554; *Morrison v. Jewell*, 34 id. 146; *Thompson v. Mansfield*, 43 id. 490.

<sup>4</sup> *Bowley v. Holway*, 124 Mass. 395.

<sup>5</sup> *Lewis v. West*, 23 Mo. App. 503.

<sup>6</sup> *Johnson v. Purvis*, 1 Hill, 322; *Sumter v. Welsh*, 1 Brev. 539; *Johns v. Nixon*, 2 id. 472.



could be relieved in part or in whole from the payment of the purchase-money: <sup>1</sup> First, if there was a partial failure of consideration, as where part of the land sold and conveyed was covered by a paramount title, which might, and in the opinion of the jury would, so far deprive the party of the benefit of his purchase. This has been essentially matter of discount,<sup>2</sup> and could be given in evidence only under a notice of discount. In such case the measure of damages to be allowed to the party on his covenant of seizin was the *pro rata* value of the land covered by the paramount title, estimated by the purchase-money and interest, and the relative value of the land lost to the land remaining.<sup>3</sup> The second class was where the [340] grantor, when he sold and at the trial, had no title to the land. In such case, the vendee having acquired no title, had, of course, no consideration for his promise; and so, when the action was on a parol contract, it was a *nudum pactum*, and the vendee might be relieved at law. The defense could be made under the general issue.<sup>4</sup> But in an action upon a specialty, before the act of 1831, the defense had to be specially pleaded or set up by way of discount.<sup>5</sup> That act merely let the party into his defense under a notice instead of a plea. In a suit on a specialty, therefore, it was deemed proper for the defendant to consider his covenant of seizin as broken to the whole extent of the purchase-money and interest, and to claim damages accordingly by way of discount. In such case, if the jury was satisfied that in fact as well as law the purchaser took nothing by his title, and that he would be ousted by the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title is a rescission of the contract, but that the damages on the covenant of seizin were exactly equal to the purchase-money and interest. It was held not necessary to appeal to equity to put the parties in *statu quo*; because the vendor's deed conveyed no title to the vendee; and the vendor could claim no rents and profits, for his vendee was liable to the owner of the paramount title for the rent of the land during the time he might

<sup>1</sup> See *Van Lew v. Parr*, 2 Rich. Eq. 347.

<sup>2</sup> *Farrow v. Mays*, 1 N. & McC. 312.

<sup>3</sup> *Furman v. Elmore*, 2 N. & McC. 199.

<sup>4</sup> *Farrow v. Mays*, *supra*.

<sup>5</sup> *Hunter v. Graham*, 1 Hill, 370.

be in possession.<sup>1</sup> Both of these classes have always been regarded as constituting legal defenses, examinable and relievable in courts of law. In the third class, where there was a good title in part, or in whole conveyed by the vendor to the vendee, and the object of the vendee's purchase was defeated, either by a part failure of the title or the failure of some incident to the purchase represented by the vendor, or shown by the title as resulting from the purchase, the purchaser was formerly held to be relievable at law, although he might be in possession by a rescission of the contract.<sup>2</sup> Subsequently, however, the court retraced their steps in respect to this class, and established the doctrine that if the purchaser had not been evicted the contract could not be rescinded in a court of law, and that the party must seek relief in a court of equity, because a court of law could not do full and [341] adequate justice between the parties.<sup>3</sup>

But at the present day it is still held that in actions brought for the purchase-money the purchaser may make a clear, subsisting, outstanding title the ground of abatement for the contract value of such part of the premises as it may cover.<sup>4</sup> And so if the warranty of quantity is broken.<sup>5</sup> The rule is

<sup>1</sup> Taylor v. Fulmore, 1 Rich. L. 52.

<sup>2</sup> Gray v. Handkinson, 1 Bay, 278; State v. Gaillard, 2 id. 11.

<sup>3</sup> Carter v. Carter, 1 Bailey, 217; Bordeaux v. Cave, id. 250; Westbrook v. McMillan, id. 259; Johnson v. Purvis, 1 Hill, 322.

<sup>4</sup> Van Lew v. Parr, 2 Rich. Eq. 347. See Means v. Brickell, 2 Hill, 657; Abercrombie v. Owings, 2 Rich. 127; Jeter v. Glenn, 9 id. 378.

<sup>5</sup> Crawford v. Crawford, 1 Bailey, 128; Ellis v. Hill, 6 Rich. 37. In this case the court say: "The rule, in our courts, long established, is, that in an action upon a security executed for the purchase-money of land, bought at a fixed rate per acre, the purchaser may abate the price by proof of deficiency in quantity; and that proof of the sale of so many acres, at a certain rate per

acre, may be adduced by parol, and a verdict thereupon shall be reduced, *pro tanto*, according to the deficiency. The doctrine is not obnoxious to anything contained in the statute of frauds; nor to that rule of evidence which excludes anything by parol to vary, contradict, add to, or subtract from, written evidence of contract. It proceeds upon the footing of failure of consideration, and has been also adjudged to belong to the rights of a defendant under our discount law (*vide* Abercrombie v. Owings, 2 Rich. 127, which is a case full to the point of the one before us). The case cited, and that of Bauskett v. Jones, 2 Spear, 68, contain a reference to a multitude of instances in which the rule has been administered as was done on circuit in the present instance. The distinc-

[342] the same in Virginia. In one case<sup>1</sup> a deed of bargain and sale conveyed a tract of land described as "containing by survey seven hundred and eighty-five acres," giving metes and bounds; the price stated in the deed was \$11,775, which is the product of seven hundred and eighty-five acres at \$15 per acre, there being no other evidence of the terms of the contract. It turning out that there was less than seven hundred and eighty-five acres, it was held that the vendee was entitled to compensation for the deficiency. He enjoined a judgment recovered against him for a balance of the purchase-money, alleging a defect in the title to the land which he failed to prove; whereupon the injunction was dissolved and the bill dismissed. Afterwards he brought another suit in which he established his right to compensation for a deficiency in the quantity of the land to an amount equal to the unpaid bal-

tion is where a gross sum has in point of fact been given for a body of land, described by metes and bounds, with quantity mentioned as additional matter of description (which intent may be the more manifest from reference to very specific boundaries, illustrated by plat annexed), and the purchaser obtains the parcel of land accordingly; and where the purchaser has bought by the acre, and stipulated to pay according to the quantity, in point of fact. Another question, dependent upon the position of a purchaser, as plaintiff in an action on the warranty, does not present itself. It is manifest the description contained in the deed of conveyance is not conclusive upon the point under consideration. It was much more specific in the case of *Abercrombie v. Owings* than in this case; in that a survey had been previously made, though of doubtful accuracy, and the conveyance expressed a gross sum as the consideration, and the quantity was stated at eighty-five acres, 'more or less,' bounded by lines beginning at a corner, and run-

ning thence, etc., according to the plat made by the surveyor, Gilbert. The conveyance here was for one-ninth part of a tract, whereon a certain person then lived, 'containing six hundred and forty acres, more or less, situate in Union district, on the west side of Broad river, adjoining lands belonging to J. H., F. S., W. D., and J. B. T.' Such was the whole specification and without plat. The defense here resisted was allowed in the case cited; *a fortiori*, it was properly allowed in the case before us. No sensible difference arises from the circumstance that in *Abercrombie v. Owings* it was stipulated, by parol, before the execution of the deed and the notes under seal, that a mistake in the quantity should be rectified when afterwards ascertained. The nature of the contract in this case implied the same. The same objection would exist in either case, the same has been urged, as to the evidence disclosing the nature and terms of the contract. Now, as heretofore, it must be held unavailing."

<sup>1</sup> *Crawford v. McDaniel*, 1 Rob. 448.

ance of the purchase-money. And it was held that he was entitled to relief as well against the damages which accrued on the dissolution of the first injunction as against the judgment at law.<sup>1</sup> Where the equitable title is conveyed, with a right to call for the legal title, the existence of the latter in a third person will not entitle the grantee to a discount.<sup>2</sup>

§ 638. **Texas and Kentucky rule.** In Texas and Kentucky the purchaser with covenants of warranty may defend against a demand of purchase-money without eviction. When he, by competent and sufficient evidence, establishes the existence and validity of an outstanding title, it was early held in the former state that there is no reason why his remedy should be delayed until he is disturbed in the enjoyment of the [243] land, and this even when the defendant is in possession.<sup>3</sup> But in such a case, whether the failure of title be partial or total, the vendee should offer to reconvey the land as to which it had failed.<sup>4</sup> If, however, the purchaser goes into possession under a deed of warranty, having notice of the defects in the title, he is not entitled to withhold the purchase-money, for the transaction still remains as the vendee understood it at the time of the purchase; and in that case he will be obliged to await eviction and rely on his covenant for the damages which result from a breach of it.<sup>5</sup> It is necessary to the defense of a failure of title, without eviction, in an action upon a purchase-money note, that the vendee should have made the purchase without notice of the defect.<sup>6</sup>

§ 639. **Pennsylvania rule.** In Pennsylvania the doctrines held on the subject under consideration are peculiar, owing in part to the blending of legal and equitable remedies in the jurisprudence of that state. If the purchase is made with notice of a defect in the title, or of an outstanding incumbrance, there is a presumption that the covenant was expressly taken

<sup>1</sup> Keyton v. Brawford, 5 Leigh, 39.

<sup>4</sup> Texas cases cited in last note. See

<sup>2</sup> Hodges v. Connor, 1 Spears, 120; Johnson v. Purvis, 1 Hill, 322.

Demarett v. Bennett, 29 Tex. 262.

<sup>3</sup> Tarpley v. Poage, 2 Tex. 139; Peck v. Hensley, 20 id. 673; Cooper v. Singleton, 19 id. 260; Woodward v. Rodgers, 20 id. 176; Cook v. Jackson, id. 209; Young v. Lofton, 12 S. W. Rep. 1061; S. C., 11 Ky. L. Rep.

<sup>5</sup> Demarett v. Bennett, *supra*; Bryan v. Johnson, 39 Tex. 31.

<sup>6</sup> Herron v. De Bard, 24 Tex. 181; May v. Ivie, 68 id. 379; Stelzer v. La Rose, 79 id. 435; Axtel v. Chase, 77 id. 74; Carson v. Kelley, 57 id. 379.



for protection against it, and if it has been broken the purchaser has a right to have his damages deducted from the purchase-money.<sup>1</sup> The defense on the ground of right to detain the purchase-money is then treated as in the nature of an action on the covenants, and is allowed to prevent circuity of action.<sup>2</sup> Where the purchaser bought without notice of an existing adverse title or incumbrance, and the consideration money has not been paid, he may defend himself in an action for it by showing that the title is defective or incumbered in [344] whole or in part, and may do so whether there are covenants or not. The rule in such case is the same after as before the execution of the deed.<sup>3</sup>

The general principle is that a purchaser may defend himself from payment of the purchase-money by reason of a clear defect or outstanding incumbrance unless the intention was to run the risk of it; and of course there can be no such intention if the defect or incumbrance was unknown.<sup>4</sup> Where one party intended to convey, and the other expected to receive a good title, it is but equity that the purchaser should have relief in case of any defect of title, although there was no express agreement for that purpose; but where the intent was that the purchaser should run the risk of title, there is not a word to be said for him.<sup>5</sup> Where, therefore, there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain.<sup>6</sup> The defect being known and not provided for, the presumption is said to be irresistible, in the absence of an express stipulation, that the vendee relied on his own judgment as to the soundness of the title.<sup>7</sup>

In *Wilson v. Cochran*<sup>8</sup> Woodward, J., thus summarizes the Pennsylvania doctrine: "The detention of the purchase-money

<sup>1</sup> *Youngman v. Linn*, 52 Pa. St. 622, 623; *Steinhauer v. Witman*, 1 S. 413; *Wilson v. Cochran*, 46 id. 229. & R. 438; *Hart v. Porter*, 5 id. 201.

<sup>2</sup> *Id.*; *Morris v. Buckley*, 11 S. & R. 168; *Christy v. Reynolds*, 16 id. 258; *Tod v. Gallagher*, id. 261; *Ives v. Niles*, 5 Watts, 323; *Poyntell v. Spencer*, 6 Pa. St. 254.

<sup>3</sup> *Youngman v. Linn*, 52 Pa. St. 413.

<sup>4</sup> *Rawle on Cov. for Tit.* (4th ed.)

<sup>5</sup> *Hart v. Porter*, *supra*.

<sup>6</sup> *Lighty v. Shorb*, 3 Penn. 447; *Wilson v. Cochran*, 46 Pa. St. 129; *Youngman v. Linn*, *supra*.

<sup>7</sup> *Smith v. Sillyman*, 3 Whart. 589; *Ross' Appeal*, 9 Pa. St. 497.

<sup>8</sup> 46 Pa. St. 231.

on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence; but the principle is well settled with us that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain the purchase-money to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the [345] bargain. But where there is a covenant against a known defect, he shall not detain purchase-money unless the covenant has been broken. If the covenant be for seizin or against incumbrances it is broken as soon as made, if a defect of title or an incumbrance exists; but if it be a covenant of warranty it binds the grantor to defend the *possession* against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for the breach of it, an eviction must be laid and proved, not necessarily by judicial process, or the application of physical force, but by the legal force of an irresistible title. There must be proof at the least of an involuntary loss of possession. And as the right to detain purchase-money is in the nature of an action on the covenant, and is allowed to prevent circuitry, the vendee who seeks to detain by virtue of a covenant of warranty is as much bound to prove an eviction as if he were plaintiff in an action of covenant. Until eviction the covenant is part of the consideration of the purchase-money he agreed to pay, and holding the covenant he may not withhold the purchase-money. But after eviction he has a right to have his damages deducted from the purchase-money.”<sup>1</sup>

If the defense is made on the ground of covenant broken, surrender of possession is not necessary;<sup>2</sup> but when, upon the equitable doctrine of this state, a purchaser seeks to resist the payment of the purchase-money, where the covenant is not

<sup>1</sup> *Murphy v. Richardson*, 28 Pa. St. 288; *Rowland v. Miller*, 3 W. & S. 393.      <sup>2</sup> *Poyntell v. Spencer*, 6 Pa. St. 257; *Wilson v. Cochran*, 46 id. 129.

broken and such money is secured by mortgage on the premises and no personal demand is made on him, but it is merely asked, in default of payment of the purchase-price, that the property conveyed be restored, the purchaser must either pay the purchase-money or restore the possession to the person from whom he received it.<sup>1</sup> In such cases relief in this form is granted on the ground that eviction may take place; but say the court in one case:<sup>2</sup> "This is very delicate ground [346] on which to administer justice to vendors and vendees, for in determining the possibility of an eviction we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly, he has no rights, as would appear the moment he attempted to assert them; or if he have rights it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land on which so unsubstantial a cloud rests, and the price also which he agreed to pay to the party who put him into possession."

§ 640. **Defenses under the code.** The code has been adopted in many states and territories, and defines very uniformly what counter-claims may be set up in the answer: it may contain a statement of any new matter constituting a defense or counter-claim. The latter is defined to be, first, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Under these provisions, of course, any claim of damages for which an action could be maintained for breach of the covenants, or for equitable relief in respect to them, would be available in the form of a counter-claim.<sup>3</sup>

<sup>1</sup> Rawle on Cov. for Tit. (4th ed.) Hurd, 7 Minn. 362; Small v. Reeves, 623, 643, note 3; Hersey v. Turbett, 14 Ind. 163. See Ludlow v. Gilman, 27 Pa. St. 424, 18 Wis. 552; Taft v. Kessell, 16 id.

<sup>2</sup> Beaupland v. McKeen, 28 Pa. St. 273; Dorr v. Streichen, 18 Minn. 26. In Akerly v. Vilas, 21 Wis. 109,

<sup>3</sup> Walker v. Wilson, 13 Wis. 522; Downer, J., said: "Before the code, Hale v. Gale, 14 id. 54; Akerly v. it was well settled that in suits Vilas, 21 id. 109; S. C., id. 377; Eaton brought to foreclose mortgages for v. Tallmadge, 22 id. 526; Lowry v. the purchase-money, in which the

§ 641. **Defenses in equity.** In those jurisdictions [337] which have entertained the defense of an entire or partial failure of title in actions on securities for purchase-money the conflict of opinion has been chiefly in respect to the allowance of damages for breach of the covenant of seizin when the facts would not justify recovery on the other covenants. There has been greater reluctance to permit a recovery in such cases where the amount is sought to be deducted from unpaid purchase-money, especially in suits for foreclosure of liens in equity, than in actions by the covenantee at law on the covenant.<sup>1</sup> In courts of equity the protection of purchasers

mortgagor, being in possession of the lands, set up a partial failure of title as a defense, without averring an actual eviction, or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. *Van Waggoner v. McEwen*, 1 Green's Ch. 422; *Abbott v. Allen*, 2 Johns. Ch. 519; *Platt v. Gilchrist*, 3 Sandf. 118; *Simpson v. Hawkins*, 1 Dana, 303; *Rawle on Cov. for Tit.* (3d ed.) 676, 686. Courts of equity declined to go into such defenses, because title to lands could better be tried in actions at law, and the damages were often unliquidated and not the subject of set-off; and also because the possession of the defendant, being undisturbed, might ripen into a perfect title. But the code allows a counter-claim to be set up in an answer to a foreclosure action, as well as in others. It is no objection to such counter-claim or claims that the damages are unliquidated, or that the claims are legal or equitable, or both; for claims legal or equitable, for liquidated and unliquidated damages on contracts, may all be set up in the same answer. The defendant who sets up by way of counter-claim a cause of action based upon the covenants in a

deed is entitled to recover the same damages as he would have recovered if he had brought a separate action on these covenants. If he declares upon the covenant of seizin and alleges breaches, it is no defense to his claim that he is in undisturbed possession of the premises. He is entitled to recover his actual damages whatever they may be, the same as in a suit at law before the code."

<sup>1</sup> Mr. Rawle (in *Cov. Tit.* 590, 4th ed.) says: "In suing upon this covenant, cases may occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may be still in possession, yet the failure of title is so complete as to authorize the assessment of damages by the consideration money, or a proportionate part of it; and in such cases it might be proper and even necessary for the plaintiff to offer to reconvey the interest or title actually vested in him, and that, although it would be no bar to his recovery that he had not done so, yet that the court might stay the execution, or reserve the actual entry of the judgment, till such conveyance were made. It is difficult to say how far this doctrine can be made to apply to actions where the defendant seeks to detain the purchase-money under similar circumstances. On the



against the collection of purchase-money where there are defects of title covered by covenants is more ample, and the jurisdiction more generally and uniformly exercised than at law. It is available, first, where the seller comes into equity to enforce payment of purchase-money by marshaling or administering assets, foreclosure of securities, or the like, and there is such a defect of title, or such expenses or payments [338] to extinguish a paramount title or incumbrance, as would sustain an action at law on the covenants for substantial damages. The court will apply these damages, ascertained according to its practice, *pro tanto* to the satisfaction of the plaintiff's claim, and only decree for the plaintiff the balance.<sup>1</sup> Second, in the exercise of its *quia timet* jurisdiction, as where there is already an actionable breach of the covenants, and the damages therefor are not a defense in a suit for purchase-money, or there has been no opportunity to make it; or loss of the estate, from the pendency of actions to enforce a paramount title or incumbrance, is imminent, and by reason of the absence or insolvency of the covenantor the remedy by action at law on the covenants will be unavailing.<sup>2</sup> Where the only

one hand, there are reasons growing from the desire to prevent circuitry of action, and the injustice that may often arise by reason of the delay, expense and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the other, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, is such as may induce a leaning in favor of the rule that unless there has been a *bona fide* eviction, actual or constructive, the parties must be left to pursue the remedies originally provided for themselves."

<sup>1</sup> *Detroit & M. R. Co. v. Griggs*, 12 Mich. 45; *Coster v. Monroe Manuf. Co.*, 2 N. J. Eq. 467; *Glenn v. Whipple*, 12 id. 50; *Van Waggoner v. McEwen*, 2 id. 412; *Earl of Bath v. Earl of Bedford*, 2 Ves. Sr. 587; *Fergus*

*v. Gore*, 1 Sch. & Lef. 107; *Lovell v. Sherwin*, 2 Eq. R. 329; 23 Eng. L. & Eq. 534; *Parker v. Harvey*, 2 Eq. Cas. Abr. 460; *In re Dickson*, L. R. 12 Eq. 154; *Van Riper v. Williams*, 2 N. J. Eq. 407; *Dayton v. Dusenbury*, 25 id. 110; *White v. Stretch*, 22 id. 79; *Fowler v. Boling*, 6 Barb. 165; *Noonan v. Lee*, 2 Black, 499; *York v. Allen*, 30 N. Y. 104; *Norton v. Jackson*, 5 Cal. 262; *Pickett v. McDonald*, 6 How. (Miss.) 269; *Kilpatrick v. Dye's Heirs*, 4 Sm. & M. 289; *Prichard v. Evans*, 31 W. Va. 137.

<sup>2</sup> *Crenshaw v. Smith*, 5 Munf. 415; *Stockton v. Cook*, 3 id. 68; *Clark v. Hardgrove*, 7 Gratt. 399; *Yancy v. Lewis*, 4 Hen. & Munf. 390; *Jones v. Waggoner*, 7 J. J. Marsh. 144; *Trumbo v. Lockridge*, 4 Bush, 417; *Andrews v. McCoy*, 8 Ala. 920; *McLemore v. Mabson*, 20 id. 139; *Wyatt v. Greer*, 4 Stew. & P. 318; *Kelly v.*

covenants in the deed are those for quiet enjoyment and of warranty, and there has been no eviction, actual or constructive, equity will not, as a general rule, interfere to prevent the collection of purchase-money.<sup>1</sup>

Allen, 34 Ala. 663; Smith v. Pettus, 1 Stew. & P. 107; Beebe v. Swartwout, 8 Ill. 177; Vick v. Percy, 7 Sm. & M. 268; McGehee v. Jones, 10 Ga. 135; Hoppes v. Cheek, 21 Ark. 588; Vance v. House, 5 B. Mon. 540; Young v. Butler, 1 Head, 640; Perciful v. Hurd, 5 J. J. Marsh. 672; Ingram v. Morgan, 4 Humph. 66; Luckett v. Triplett, 2 B. Mon. 39; Champlin v. Dotson, 13 Sm. & M. 553; Wofford v. Ashcraft, 47 Miss. 641; Atwood v. Vincent, 17 Conn. 575; Davis v. Logan, 5 B. Mon. 341; Jones v. Stanton, 11 Mo. 433; Denny v. Wickliffe, 1 Met. (Ky.) 226; Green v. Campbell, 2 Jones' Eq. 446; Shannon v. Marselis, 1 N. J. Eq. 413; Hatcher v. Andrews, 5 Bush, 561; Simpson v. Hawkins, 1 Dana, 303; Willy v. Fitzpatrick, 3 J. J. Marsh. 582; Morrison v. Beckwith, 4 T. B. Mon. 73.

<sup>1</sup> Hunt v. Marsh, 80 Mo. 396; Cartwright v. Culver, 74 id. 179; Pershing v. Canfield, 70 id. 140; Platt v. Gilchrist, 3 Sandf. 118; Patton v. Taylor, 7 How. (U. S.) 132; Refeld v. Woodfolk, 22 id. 318; Noonan v. Lee, 2 Black, 499; Bumpus v. Platner, 1 Johns. Ch. 213; Abbott v. Allen, 2 id. 519; Gouverneur v. Elmendorf, 5 id. 79; James v. McKernan, 6 Johns. 543; Prevost v. Gratz, 3 Wash. C. C. 434; Beach v. Waddill, 8 N. J. Eq. 299; Leggett v. McCarty, 3 Edw. Ch. 124; Woodruff v. Bunce, 9 Paige, 443;

Greenleaf v. Queen, 1 Pet. 138; Whitworth v. Stuckey, 1 Rich. Eq. 409; Van Lew v. Parr, 2 id. 321; Maner v. Washington, 3 Strobb. Eq. 171; Young v. McClung, 9 Gratt. 336; Long v. Israel, 9 Leigh, 556; Young v. Butler, 1 Head, 640; Buchanan v. Alwell, 8 Humph. 516; Elliott v. Thompson, 4 id. 99; Lewis v. Morton, 5 T. B. Mon. 1; Vance v. House, 5 B. Mon. 537; Casey v. Lucas, 2 Bush, 55; Ohling v. Luitjens, 32 Ill. 23; Beck v. Simmons, 7 Ala. 76; Wilty v. Hightower, 6 Sm. & M. 345; McDonald v. Green, 9 id. 138; Beebe v. Swartwout, 8 Ill. 162; Eddington v. Nix, 49 Mo. 134; Cooley v. Rankin, 11 Mo. 647; Middlekauff v. Barrick, 4 Gill. 290; Hall v. Priest, 6 Bush, 12; Busby v. Treadwell, 24 Ark. 456; Hile v. Davison, 20 N. J. Eq. 228; Hulfish v. O'Brien, id. 230; Ludlow v. Gilman, 18 Wis. 552; Akerly v. Vilas, 21 id. 88; Timms v. Shannon, 19 Md. 296; Merritt v. Hunt, 4 Ired. Eq. 406; Wilkins v. Hogue, 2 Jones' Eq. 479; Henry v. Elliot, 6 id. 175; Clanton v. Burges, 2 Dev. Eq. 13; Beale v. Seiveley, 8 Leigh, 658; Perciful v. Hurd, 5 J. J. Marsh. 670; Miller v. Long, 3 A. K. Marsh. 334; Anderson v. Lincoln, 5 How. (Miss.) 279; Gartman v. Jones, 24 Miss. 234; Wailes v. Cooper, id. 208; Edwards v. Morris, 1 Ohio, 239; Stone v. Buckner, 12 Sm. & M. 73; Maxfield v. Bierbauer, 8 Minn. 420; Glenn v. Whipple, 12 N. J. Eq. 50.

## CHAPTER XIV.

## VENDOR AND VENDEE — PERSONAL PROPERTY.

## SECTION 1.

## VENDOR AGAINST VENDEE.

- § 642-644. Recovery on executed sales.  
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## SECTION 2.

## VENDEE AGAINST VENDOR.

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## SECTION 1.

## VENDOR AGAINST VENDEE.

[347] § 642. **Recovery on executed sales.** Where there has been a delivery, or what is equivalent to it, of the property sold, or which the vendor is at liberty to treat as sold, and when the contract is thus so far executed that the title has passed to the vendee, the vendor is entitled to the price or value.<sup>1</sup> A sale or an agreement to sell may be valid though

<sup>1</sup> By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it fol-

the price of the property be not named and fixed. Thus, it has been laid down by an elementary writer that *express* contracts are those where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price [348] for certain goods; *implied*, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves; as, if I take up wares from a tradesman without any agreement as to price, the law concludes that I contracted to pay their real value.<sup>1</sup> A doubt was at one time expressed in an English case whether, where the parties are altogether silent as to the price in an executory contract of purchase and sale, the law will supply the want of an agreement by inferring that they must have intended to sell and to buy at a reasonable price; but it was declared that, undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendant, in order to prevent the injustice of his taking them without paying for them.<sup>2</sup> This doubt, however, was removed by a decision soon after-

lows that to constitute a valid sale there must be a concurrence of the following elements, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or promised. Benj. on Sales, § 1. All that is required to give validity to a sale of personal property, whatever may be the amount or value, is the mutual assent of the parties to the contract. As soon as it is shown by any evidence, verbal or written, that it is agreed by mutual assent that the one shall transfer the absolute property in the thing to the other for a money price the contract is completely proven and binding on both parties. See *Lincoln v. Johnson*, 43

Vt. 74, 77; *Williamson v. Berry*, 8 How. (U. S.) 544. If by the terms of the agreement the property in the thing sold passes immediately to the buyer, the contract is termed in the common law "a bargain and sale of goods;" but if the property is to remain for the time being in the seller and only to pass to the buyer at a future time or on the accomplishment of certain conditions; as, for example, if it is necessary to weigh or measure what is sold out of the bulk belonging to the vendor, then the contract is called in the common law an executory agreement. Benj. on Sales, § 3.

<sup>1</sup> 1 Black. Com., p. 443.

<sup>2</sup> *Acebal v. Levy*, 10 Bing. 376; note 2 to *Webber v. Tivill*, 2 Saund. 121.



wards in the same court, this language being used: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."<sup>1</sup> Also: "A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity or from various other causes."<sup>2</sup> Where an order, silent as to price, is sent to a merchant or manufacturer of goods in which he deals and is ac-  
[349] cepted, the law fixes the price at the current rate at which the goods are sold, and the party ordering is bound equally as though the price had been stated in the order. So, where an order is given for two articles mixed, to a manufacturer of such mixture, without specifying the proportion of each, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for market, and the acceptance of the order makes a valid contract to that effect.<sup>3</sup> A personal delivery of goods by a dealer to a customer, or by any person on request to another, is a transaction of the same nature, and there is a tacit agreement to pay the customary price or what they are reasonably worth.<sup>4</sup> The vendor is entitled to their value at the time of

<sup>1</sup> *Hoadly v. McLaine*, 10 Bing. 482; *Deck v. Feld*, 38 Mo. App. 674.

This rule cannot be applied in an action by the purchaser for damages for failure to deliver the purchased property. *Trunkey v. Hedstrom*, 131 Ill. 204.

<sup>2</sup> *Acebal v. Levy*, 10 Bing. 376.

<sup>3</sup> *Konitzky v. Meyer*, 49 N. Y. 571; *Vickery v. Evans*, 16 Ind. 331.

<sup>4</sup> *Althouse v. Alvord*, 28 Wis. 517.

In this case *Dixon, C. J.*, said: "The cost of the material out of which the article is made, . . . or in other words the profits arising to the vendor from the manufacture and sale, are matters quite foreign to the issue, where the manufactured article itself has a fixed and uniform market price or value. The purchaser must be presumed to have been familiar with such usual price or value, and to

executing the order without reference to any subsequent rise in the market price.<sup>1</sup>

§ 643. **Same subject.** Where, by a course of dealing or custom, there is one price for cash and another and larger price if credit is given, and a charge is made and the account presented in expectation of payment at once, and it is not made, the value of the credit price may be recovered.<sup>2</sup> If goods are delivered upon a special contract, and on examination are rejected as not conformable to it, but not returned to the vendor, he may recover their market value.<sup>3</sup> So, if property is paid on a contract which is afterwards rescinded, the value of the property delivered, rather than the contract price of it, may be recovered.<sup>4</sup> The parties may agree that the price may be fixed by a third person named by them. They are then as much bound by the price he may fix, and it [350] is as much a part of the contract, as if fixed by them.<sup>5</sup> Until it is fixed the agreement to sell is incomplete.<sup>6</sup> But if the property has passed to the vendee, and he does any act to obstruct or render impossible the valuation in the mode agreed upon, the vendor will be entitled to recover its value as estimated by a jury, as where the defendant agreed to buy goods at a valuation, and the valuers disagreed, and thereupon the defendant consumed the goods.<sup>7</sup> So the parties may agree that a third person may decide any other fact upon which the identity, price or quantity depends, as to select, inspect, weigh or measure the commodity sold. The person whom they ap-

have bought with reference to it, and therefore willing to pay it. At all events, it would be most unjust to the seller under such circumstances, there being no stipulation as to price, to require him to take less than he could have obtained elsewhere or from other purchasers." *Henckley v. Hendrickson*, 5 McLean, 170; *Wells v. Abernethy*, 5 Conn. 222; *Burr v. Williams*, 23 Ark. 244.

<sup>1</sup> *Hill v. Hill*, 1 N. J. L. 261; *Jenkins v. Richardson*, 6 J. J. Marsh. 541.

<sup>2</sup> *Taylor v. Tucker*, 1 Ga. 231.

<sup>3</sup> *Shields v. Pettie*, 4 N. Y. 122;

*Terwilliger v. Knapp*, 3 E. D. Smith, 86; *Howard v. Hoey*, 23 Wend. 350.

<sup>4</sup> *Camp v. Pulver*, 5 Denio, 48.

<sup>5</sup> *Benj. on Sales*, § 87; *Brown v. Bellows*, 4 Pick. 189; *Cunningham v. Ashbrook*, 20 Mo. 553; *McCandlish v. Newman*, 22 Pa. St. 460; *Nutting v. Dickinson*, 8 Allen, 540.

<sup>6</sup> *Id.*; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Cooper v. Shuttleworth*, 25 L. J. (Exch.) 14; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Meriv. 507.

<sup>7</sup> *Clark v. Watson*, 18 C. B. 277; *Carter v. McNeeley*, 1 Ired. L. 448.

point for such purpose thereby becomes the agent of both parties, and his action in the matter for which he was appointed, honestly performed, will be conclusively binding upon them.<sup>1</sup> If it does not appear that the person so employed acted corruptly, or made some gross mistake,<sup>2</sup> in the absence of fraud or anything tending to show unfairness on the part of the plaintiff in procuring the result, the action of the referee is mutually binding.<sup>3</sup> Where mill logs were sold at a specified price per thousand feet, according to the quantity of lumber they should afterwards be estimated to make, and there was a table or scale of estimation then in such general use that the parties were found by the jury to have referred to it as a rule for computing the quantity, it was held that they were bound by it, though it proved erroneous in some respects.<sup>4</sup>

<sup>1</sup> President, etc. D. & H. C. Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Savercool v. Farwell, 17 Mich. 319; Merrill v. Gore, 29 Me. 346; McAndrews v. Santee, 57 Barb. 193; Oakes v. Moore, 24 Me. 214.

<sup>2</sup> Robinson v. Fiske, 24 Me. 401.

<sup>3</sup> McParlin v. Boynton, 8 Hun, 449; Newlan v. Dunham, 60 Ill. 23. In this case the court say the decision of the referee cannot be affected by proof of mistake, but only by fraud. See Chapman v. Dease, 34 Mich. 375.

<sup>4</sup> Heald v. Cooper, 8 Me. 32. In this case Parris, J., delivering the opinion, said: "No mode is prescribed in the written contract by which this estimate is to be made; and it is understood that, from the nature of the article to be delivered, the exact contents could not be ascertained until after the logs had been taken down the river and converted into boards. But it is alleged on the part of the plaintiff that this contract was entered into in reference to a usage or custom prevailing among log dealers on the K. river to ascertain the quantity of boards which may be made from a log or a lot of logs by a scale

called the Brunswick scale; and it was submitted to the jury to determine whether, at the time of making the contract, that scale was in such general and exclusive use as that the parties in making their contract must be presumed to have had reference to it, and would expect to ascertain the number of feet of boards which the logs would make by that scale, and they found in the affirmative. This usage explains the intent of the parties; and not being in opposition to established principles of law, or a contradiction to the express terms of the written instrument, is deemed to form a part of the contract as much as though actually incorporated into it, or expressly referred to. Williams v. Gilman, 3 Me. 276; 2 Stark. Ev. 453. . . . Considering that the jury have found the usage, and that the parties contracted in reference to such usage, they are bound by it, and the plaintiff is entitled to \$3 per thousand according to the scale, unless the defendants entered into the contract under such circumstances as will absolve them from

Where a contract for the sale of hops provided for an [351] inspection by one of the two vendors, or another person mutually satisfactory, and the designated seller made the inspection, it was held an essential prerequisite to the tender of [352] the goods, and none the less conclusive for having been made by the party selling. The court say: "The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and, when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. . . . And if it was only *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be

the whole or any part of it. They contend that the estimate by the Brunswick scale is erroneous; that its application to logs of the size of those delivered under this contract gives a larger quantity of boards than can be actually produced; and that the plaintiff is, therefore, not entitled to the benefit of that part of the contract growing out of the usage, but must be holden to the strict quantity, or, at farthest, to the estimate made by the Leonard scale, which is understood to be more exact in giving the quantity of boards to be produced from logs of the size of these than the Brunswick scale. . . . The presumption from these facts (stated) is that the defendants knew the general size and quality of the logs they purchased, and also the scale by

which they were to be estimated; and if they did not, that it was in consequence of a want of such diligence as the law presumes every man having a due regard to his own interests would be likely to use. . . . It is evident that a scale founded on general principles cannot, in its application, be equally exact in all cases. If a given per cent. is to be deducted as waste from the contents of the log, it is apparent that if the deduction be correct in a large log it cannot be so in a small one. But it is not found, certainly is not to be presumed, that the defendants, dealers in lumber as they are, could be ignorant of a fact so apparent and important to the interests of all persons engaged in the lumber business." See *Barker v. Roberts*, 8 Me. 101.



entirely defeated.”<sup>1</sup> An inspection and measurement of saw-logs by a third person, acting as the vendor’s agent, had been made before the contract of sale, and the contract was based upon them, referring to and adopting such person’s scaling. It was held they did not thereby become of the same conclusive nature as when made after the contract, pursuant to employment by both parties, unless the vendee was fully acquainted with the person’s qualifications.<sup>2</sup> Campbell, J., said: “If the parties had agreed on a sale before the logs were scaled, and had agreed that W. should scale them, he would have been made their joint agent and arbiter, and it would be difficult to impeach any act of his, honestly done, for a mere mistake of judgment. But when these logs were measured, he was acting entirely as the agent of the vendors, and on their behalf. Under these circumstances an offer to sell by his measurement already made involves an assertion that he is in all respects a competent person, and that he has acted honestly. [353] Nothing short of satisfactory evidence that the purchaser was fully acquainted with his qualifications would remove this burden from the vendor, who demands a sound price on the basis of his measurement. And where a person so employed, even by joint appointment, makes a mistake in a matter of fact, and not merely an error of judgment, there is no ground for holding that such a mistake cannot be corrected. An erroneous assay of silver, or a mistaken count of bushels of grain, has been held to bind no one.<sup>3</sup> A material representation or assumption need not be fraudulent in fact in order to authorize its correction.”

§ 644. **Same subject.** To entitle the seller to recover the full value — either the contract or the market price — the sale must be executed so as to pass the title to the purchaser; the property must be at his risk, and he thus qualified to bring trover for it. Then, and not till then, an action either for goods sold and delivered, or bargained and sold, may be maintained; the former if there has been delivery, and the latter if there has not.<sup>4</sup> The sale of a specific chattel passes the prop-

<sup>1</sup> *Dustan v. McAndrew*, 44 N. Y. 76;  
*Sawyer v. Dean*, 114 id. 469, 478.

<sup>2</sup> *Ortman v. Green*, 26 Mich. 209.

<sup>3</sup> *Cox v. Prentice*, 3 M. & S. 344;  
*Wheaton v. Olds*, 20 Wend. 174.

<sup>4</sup> *Dwiggins v. Clark*, 94 Ind. 49;

erty in it to the vendee without delivery,<sup>1</sup> and the risk of property which is the subject of a sale attends the title.<sup>2</sup> [354] But where the sale is of goods generally, no property in them passes until there is a subsequent appropriation according to the contract of the goods to which it applies. Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.<sup>3</sup>

Tufts v. Lawrence, 77 Tex. 526; Bailey v. Smith, 43 N. H. 141; Gordon v. Norris, 49 id. 376; Messer v. Woodman, 22 id. 172; Davis v. Hill, 3 id. 382; Ward v. Shaw, 7 Wend. 404; Outwater v. Dodge, 7 Cow. 85; Warren v. Buckminster, 24 N. H. 336; Fuller v. Bean, 34 id. 290; Newmarket Iron F. v. Harvey, 23 id. 395; Williams v. Jones, 1 Bush, 621; Sands v. Taylor, 5 Johns. 395; Penniman v. Hartshorn, 13 Mass. 87; Macomber v. Parker, 13 Pick. 175; Hart v. Tyler, 15 id. 171; Atwood v. Lucas, 53 Me. 508; Atkinson v. Bell, 8 B. & C. 277; Elliott v. Pybus, 10 Bing. 512; Simmons v. Swift, 5 B. & C. 857; Goodall v. Skelton, 2 H. Black. 316; Hanson v. Meyer, 6 East, 614; Rohde v. Thwaites, 6 B. & C. 388; Benj. on Sales, § 765; Nichols v. Morse, 100 Mass. 523; Morse v. Sherman, 106 id. 430; Dyer v. Libby, 61 Me. 45; Jenness v. Wendell, 51 N. H. 63; Spicers v. Harvey, 9 R. I. 582; Scotten v. Sutter, 37 Mich. 526; Phillips v. Meritt, 2 Up. Can. C. P. 513.

<sup>1</sup> Dixon v. Yates, 5 B. & Ad. 313, 340; Simmons v. Swift, 5 B. & C. 862; Gilmour v. Supple, 11 Moore, P. C. 566; Arnold v. Delano, 4 Cush.

40; Roper v. Lane, 9 Allen, 502, 510; Marble v. Moore, 102 Mass. 443; Hinde v. Whitehouse, 7 East, 558; Tarling v. Baxter, 6 B. & C. 360; Martindale v. Smith, 1 Q. B. 359; Spartali v. Benecke, 10 C. B. 212; Calcutta Co. v. De Mattos, 32 L. J. (Q. B.) 322; Wood v. Bell, 6 E. & B. 355; Dailey v. Green, 15 Pa. St. 118; Webber v. Davis, 44 Me. 147; Kohl v. Lindley, 39 Ill. 195; Bailey v. Smith, 43 N. H. 141; Sigerson v. Kahmann, 39 Mo. 206; Tome v. Dubois, 6 Wall. 548; Dexter v. Norton, 55 Barb. 272.

<sup>2</sup> Willis v. Willis, 6 Dana, 48; Dailey v. Green, 15 Pa. St. 118; Joyce v. Adams, 8 N. Y. 296; Terry v. Wheeler, 25 id. 520; Taylor v. Lapham, 13 Allen, 26.

<sup>3</sup> Dixon v. Yates, 5 B. & Ad. 313; Barrett v. Goddard, 3 Mason, 107; Hotchkiss v. Hunt, 49 Me. 213; Merrill v. Parker, 24 id. 89; Mears v. Williamson, 37 id. 556; Waldron v. Chase, id. 414; Page v. Carpenter, 10 N. H. 77; Felton v. Fuller, 29 id. 121; Willis v. Willis, 6 Dana, 48; Crawford v. Smith, 7 id. 59; Sweeney v. Owsley, 14 B. Mon. 413; Buffington v. Ulen, 7 Bush, 231; Martin v. Adams,

Where the contract respecting specific property requires certain acts to be performed upon the property itself, necessary to its completion, or for the ascertainment of what shall be paid for it on the terms of the contract, or to place the property in another place for the benefit of the vendee, then whether the sale is complete and the title passes before the performance of these acts depends on the intention of the parties. The authorities are not quite harmonious as to when, in such cases, the title does pass.<sup>1</sup> If there are any conditions precedent they must of course be performed or waived.<sup>2</sup> The title does not pass, and there is no right of action for the contract price, or for damages measured by the value of the subject of the sale, when the agreement is for the sale of goods [355] generally, and there is in the contract no identification of any particular goods, until such steps are taken afterwards by one or both of the parties in pursuance of the contract as are necessary to the selection and appropriation of the specific property to it, unless there is a stipulation to pay while the contract is executory. When those steps have been taken the contract ceases to be executory; it becomes a complete bargain and sale; the title passes and the vendor is entitled to the price, equally as if the property so appropriated had been at the making of the contract described and identified in it.<sup>3</sup>

104 Mass. 262; Merchants' Nat. Bank v. Bangs, 102 id. 291; Thayer v. Lapham, 13 Allen, 28; Warden v. Marshall, 99 Mass. 305; Gardner v. Lane, 9 Allen, 498; Rice v. Codman, 1 id. 377; Bethel St. M. Co. v. Brown, 57 Me. 9; Dyer v. Libby, 61 id. 45; Habenicht v. Lissak, 77 Cal. 139; Georgia Refining Co. v. Augusta Oil Co., 74 Ga. 497. See Waldon v. Murdock, 23 Cal. 540; Russell v. Carrington, 42 N. Y. 118; Adams Mining Co. v. Senter, 26 Mich. 73.

<sup>1</sup> Benj. on Sales, Book 2, ch. 3; Lingham v. Eggleston, 27 Mich. 324; Hatch v. Fowler, 28 id. 205; Wilkinson v. Holiday, 33 id. 386; Chamblee v. McKenzie, 31 Ark. 155.

<sup>2</sup> Id.; United Society v. Brooks, 145 Mass. 410.

<sup>3</sup> Crawford v. Earl, 38 Wis. 312; Thompson v. Alger, 12 Met. 428; Thorndike v. Locke, 98 Mass. 340; Bement v. Smith, 15 Wend. 493; Sands v. Taylor, 5 Johns. 395; Alexander v. Gardner, 1 Bing. N. C. 671; Gordon v. Norris, 49 N. H. 376; Jenness v. Wendell, 51 id. 63; Spicers v. Harvey, 9 R. I. 582; Scudder v. Worster, 11 Cush. 573; Browning v. Hamilton, 42 Ala. 484; Bailey v. Smith, 43 N. H. 141; Messer v. Woodman, 22 id. 172; Garland v. Lane, 46 id. 245; Woolsey v. Bailey, 27 id. 217; Macomber v. Parker, 13 Pick. 175; Putnam v. Tillotson, 13 Met. 517; Stanton v. Eager, 16 Pick. 467; Johnson v. Stoddard, 100 Mass. 306; Odell v. Boston & M. R., 109 Mass. 50; Claffin v. Boston & L. R. Co., 7 Allen,

Several cases in New York seem to affirm the right of a vendor to tender goods on an executory contract of sale, and sue for the price, though the agreement did not give him the right of selecting and appropriating the particular goods to it.<sup>1</sup> When articles are ordered to be manufactured they are treated as the property of the vendee when made, [356] and notice thereof given to him with request to take them away. The vendor has then an immediate right of action for the price.<sup>2</sup> After goods are sold it is the duty of the buyer to take them away within a reasonable time, and if he neglects to do so the seller may charge for warehouse room, if prejudiced by the delay.<sup>3</sup> Where goods are sold to be paid for by bill or note, payable at a future day, and the bill or note is not given, general *assumpsit* for goods sold and delivered cannot be maintained until the credit has expired;<sup>4</sup> but the vendor may sue at once on the special agreement, and recover the whole amount for which the bill or note should have been given, or the value of the goods.<sup>5</sup> In a New York

341; *Ballentine v. Robinson*, 46 Pa. St. 179; *Dustin v. McAndrew*, 44 N. Y. 72; *Krulder v. Ellison*, 47 id. 36; *Rodgers v. Phillips*, 40 id. 519; *Torrey v. Corliss*, 33 Me. 336; *Barry v. Palmer*, 19 id. 303; *Dutton v. Solomonson*, 3 B. & P. 582; *Aldridge v. Johnson*, 7 E. & B. 885; *Brown v. Hare*, 3 H. & N. 484; *Fragano v. Long*, 4 B. & C. 219; *Elliott v. Pybus*, 10 Bing. 512.

In *Lamkin v. Crawford*, 8 Ala. 153, it was held that a purchaser at a sheriff's sale is liable to an action by the sheriff, and the right to recover the full price cannot be controverted, if the latter at the time of the trial has the ability to deliver the thing purchased, or if it has been placed at the disposal of the purchaser by tender.

<sup>1</sup> *Bridgeford v. Crocker*, 60 N. Y. 627; *Westfall v. Peacock*, 63 Barb. 207. See *Bagley v. Findlay*, 82 Ill. 524; also *McClure v. Williams*, 5 Sneed, 718.

In *Dayton v. Rowland*, 1 Daly, 446, it was held that where, by the custom of trade, a purchaser of goods on shipboard is bound to unload them within a definite time, and by reason of his failure to take the goods within that time the owner is obliged to pay lighterage and storage fees thereon, the purchaser is liable for such payments.

<sup>2</sup> *Higgins v. Murray*, 4 Hare, 565; *Bement v. Smith*, 15 Wend. 493; *Ballentine v. Robinson*, 46 Pa. St. 179; *Goddard v. Binney*, 115 Mass. 450; *Morse v. Sherman*, 106 id. 430; *Mixer v. Howarth*, 21 Pick. 205.

<sup>3</sup> See *Greaves v. Ashlin*, 3 Camp. 426.

<sup>4</sup> *Dodge v. Waterman*, 36 N. H. 186; *Allen v. Ford*, 19 Pick. 217; *Yale v. Coddington*, 21 Wend. 175; *Scott v. Montague*, 16 Vt. 164.

<sup>5</sup> *Hutchinson v. Reed*, 3 Camp. 329; *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Haskins v. Duperoy*, 9 East, 498; *Adams*



case it was suggested that there should be a rebate of interest during the stipulated period of credit.<sup>1</sup>

§ 645. **Recovery for part of stipulated quantity.** Where an entire contract is made for the sale and delivery of personal property, either for a gross sum or at a certain price per unit of its measure or weight, and it is only in part performed by the vendor, no action, of course, can be maintained on the contract for such part performance, and formerly there could be no recovery in any form;<sup>2</sup> and that doctrine is still adhered to in some states.<sup>3</sup> But a more just and equitable rule [357] generally prevails. If the vendee retains the part delivered after the vendor has made default in respect to the residue, it is a severance of the contract, and the vendor is entitled to recover the contract price for what is so delivered and retained, subject to recoupment of such damages as the vendee sustains for non-performance of the entire contract,<sup>4</sup> or the value, subject to like counter-claim.<sup>5</sup> The vendee may return the part delivered when delivery of the whole is due and not made, if he chooses; but if he retains it, it is deemed just that he should make compensation for it; and the same rule applies to other contracts, namely, that the party who

v. Filer, 7 Wis. 306; Loring v. Gurney, 4 Pick. 16; Hunneman v. Grafton, 10 Met. 454; Fuller v. Sweet, 30 Mich. 237; Barron v. Mullin, 21 Minn. 374; McCormick v. Basal, 46 Iowa, 235; Rinehart v. Olwine, 5 W. & S. 157; Bicknell v. Buck, 58 Ind. 354; Stoddard v. Mix, 14 Conn. 12; Carnahan v. Hughes, 108 Ind. 225; Stephenson v. Repp, 47 Ohio St. 551; Hanna v. Mills, 21 Wend. 90; American Manuf. Co. v. Klarquist, 47 Minn. 344.

<sup>1</sup> Hanna v. Mills, 21 Wend. 90.

<sup>2</sup> 2 Kent's Com. 509.

<sup>3</sup> Champlin v. Rowley, 18 Wend. 187; S. C., 13 id. 258; McMillan v. Vanderlip, 12 Johns. 165; Youngs v. Kent, 2 Sweeny, 257; Flanagan v. Demarest, 3 Robt. 183; Moses v. Banker, 2 Sweeny, 267; McCormick v. Sarson, 1 id. 161; Currie v. White,

id. 166; Keen v. Tupper, 33 N. Y. Super. Ct. 465; S. C., 52 N. Y. 550; Catlin v. Tobias, 26 id. 217; Mead v. Degolyer, 16 Wend. 632; Witherow v. Witherow, 16 Ohio, 238; Williams v. Sherman, 48 Barb. 402. See Leavenworth v. Packer, 52 id. 132.

<sup>4</sup> Bowker v. Hoyt, 18 Pick. 555; Smith v. Foster, 36 Vt. 705; Abbott v. Wyse, 15 Conn. 254; Horn v. Batchelder, 41 N. H. 86; Richard v. Shaw, 67 Ill. 222; Polhemus v. Heiman, 45 Cal. 573.

<sup>5</sup> Cole v. Swanston, 1 Cal. 51; Ruiz v. Norton, 4 id. 355; Clark v. Moore, 3 Mich. 55; Chapman v. Dease, 34 id. 375; Wilson v. Wager, 26 id. 452; Begale v. McKinzie, id. 470; Oxendale v. Witherell, 9 B. & C. 386; Cooke v. Munstone, 1 P. & B. N. R. 351; Read v. Rann, 10 B. & C. 441.

accepts and appropriates the benefit of a partial performance should pay therefor to the extent of the benefit, but has the right to damages for the other party's failure to perform in full.<sup>1</sup> A contract for property to be delivered in instalments, where each instalment is to be paid for separately, is not entire. The vendor will be entitled to recover for any delivered instalment, irrespective of default in the delivery of others.<sup>2</sup>

In contracts for future delivery of goods, to be subsequently or concurrently paid for, the delivery being a condition on the performance of which the right to payment depends, if the contract is entire there must be a delivery of the whole to fulfill the condition.<sup>3</sup> But where delivery is to be made in parcels or instalments, severable not only in bulk but [358] prices and times of delivery, the delivery of each parcel is a condition only to payment *pro tanto*.<sup>4</sup> Nor will a default in respect to one severable part entitle the other party to rescind, unless there is then a renunciation of the entire contract, persisted in afterwards.<sup>5</sup> In *Norrington v. Wright*<sup>6</sup> Mr. Justice Gray reviews the English and American cases, and, speaking for the court, says that the seller is bound to deliver the quantity stipulated for and has no right either to compel the buyer to accept a less quantity or to require him

<sup>1</sup> *Chapman v. Dease*, 34 Mich. 375.

<sup>2</sup> *Loomis v. Eagle Bank*, 10 Ohio St. 327; *Moore v. Logan*, 5 Up. Can. C. P. 294. See *Seymour v. Davis*, 2 Sandf. 239.

<sup>3</sup> *Howe v. Huntington*, 15 Me. 350; *Warren v. Wheeler*, 21 id. 484; *Howland v. Leach*, 11 Pick. 151; *Swan v. Drury*, 22 id. 485; *Dana v. King*, 2 id. 155; *Lord v. Belknap*, 1 Cush. 279; *Gazley v. Price*, 16 Johns. 267; *Williams v. Henley*, 3 Denio, 363; *Cornwall v. Haight*, 8 Barb. 327; *Champion v. Rowley*, 18 Wend. 187; *Jones v. Marsh*, 22 Vt. 144; *Shaw v. Turnpike Co.*, 2 Penn. 454; *Smith v. Liscomb*, 13 Tex. 532; *Barber v. Willard*, 4 McLean, 356; *Grundy v. McClure*, 2 Jones' L. 142; *Hough v. Rawson*, 17 Ill. 588; *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*,

6 M. & Gr. 942; *Boyd v. Lite*, 1 C. B. 222; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowen*, L. R. 1 C. P. 484; *Murphy v. St. Louis*, 8 Mo. App. 483.

<sup>4</sup> *Smith v. Keith & P. Coal Co.*, 36 Mo. App. 567; *Johnson v. Allen*, 78 Ala. 387; *Brown v. Muller*, L. R. 7 Exch. 319. See *Deming v. Kemp*, 4 Sandf. 147; *Seymour v. Davis*, 2 id. 239.

<sup>5</sup> *Roper v. Johnson*, L. R. 8 C. P. 167; *Withers v. Reynolds*, 2 B. & Ad. 882; *Smoot's Case*, 15 Wall. 36; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Frost v. Knight*, L. R. 5 Exch. 322; *Burtis v. Thompson*, 42 N. Y. 246. See *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

<sup>6</sup> 115 U. S. 188; *Lee v. Sickles Saddlery Co.*, 38 Mo. App. 201.

to select part out of a greater quantity. When the property is to be shipped in certain proportions monthly the failure to ship the required quantity in the first month gives the purchaser the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once, if such right is distinctly and reasonably asserted.<sup>1</sup>

§ 646. **Same subject.** Where the contract provides for a series of deliveries, and there is a renunciation of it by the seller and a consequent default in respect to all or several of them, it has been held, where action was delayed until after the time stipulated for the last delivery, that the proper measure of damages is the sum of the difference between the contract and market prices on the days when the several deliveries were due.<sup>2</sup> In *Barningham v. Smith*<sup>3</sup> the defendants contracted with the plaintiff to deliver from the 1st of January until the 31st of December, 1872, six thousand two hundred and sixty wagons of coal at 7s. 3d. per ton of two thousand pounds, at the fair average rate of twenty wagons per day; payment by three months' acceptance drawn on the 10th of each month for the previous month's supply. The deliveries were irregular in point of time, and insufficient as to quantity; they failed to comply with the condition that they should be at the fair average rate of twenty wagons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendant at any time during 1872, but on the 13th of February, 1873, he bought coal in the market to supply

<sup>1</sup> This rule is substantially in accord with *Hoare v. Rennie*, 5 H. & N. 19; *Coddington v. Paleologo*, L. R. 2 Exch. 193; *Bowes v. Shand*, 2 App. Cas. 455; *Reuter v. Sala*, 4 C. P. Div. 239; *Houck v. Muller*, 7 Q. B. Div. 92. It differs from that announced in *Simpson v. Crippin*, L. R. 8 Q. B. 14, and *Brandt v. Lawrence*, 1 Q. B. Div. 344. See *Hill v. Blake*, 97 N. Y. 216; *King Phillip's Mills v. Slater*, 12 R. I. 82; *Smith v. Keith & P. Coal Co.*, 36 Mo. App. 567.

<sup>2</sup> *Brown v. Muller*, L. R. 7 Exch. 319; *Johnson v. Allen*, 78 Ala. 387; *Hill v. Chipman*, 59 Wis. 211; *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463; *Hamilton v. Magill*, 2 L. R. Ire. 186, 201; *Roper v. Johnson*, L. R. 8 C. P. 167.

<sup>3</sup> 31 L. T. (N. S.) 540; *Ex parte Llan-samlet Tin Plate Co.*, L. R. 16 Eq. 155; *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185.

the whole deficiency at a very much higher price, namely, 19*s.* per ton. Coal had been gradually rising in price throughout the successive months of 1872, and it rose more rapidly in the months of January and February, 1873. The plaintiff [359] claimed to be entitled to damages to the extent of the difference between the contract price of 7*s.* 3*d.* and the market price at the expiration of such a reasonable time after the 31st of December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole deficiency left undelivered by the defendants throughout the year 1872. The defendants contended he was not entitled to wait until the expiration of the year before assessing his damages; that a breach was committed as often as a month expired without the proper quantity having been delivered, and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price; or that the breaches were committed at some shorter periods, but that the damages should be calculated at the end of each month. It was held that as soon as the defendants failed to deliver a fair average of coal according to the terms of the contract a breach had taken place, for which at that time the plaintiff was entitled to damages as upon that breach, and so on from time to time, to the last; that it was an erroneous way of estimating the damages, by waiting until the full period of the contract had expired, and then claim the difference at that time.<sup>1</sup> If the purchaser notifies the vendor that no more property will be received under the contract after a specified date, and a tender is subsequently made of the undelivered portion, if there has been an advance in the price between the time of the notice and the tender and a diminution in the difference between the contract and the market price, the variance between these when the tender is made measures the damages.<sup>2</sup> If the purchaser's orders for the maximum quantity demandable in any month under the contract are not wholly filled, and in subsequent months more than that quantity is delivered and accepted, there is a waiver *pro tanto* of the earlier breach. In determining the disposition to be made of the excessive deliveries courts will apply

<sup>1</sup> See *Tyers v. Rosedale, etc. Co., L. R. 8 Exch. 305.*

<sup>2</sup> *Rhodes v. Cleveland Rolling Mill Co., 17 Fed. Rep. 426.*



the rule which governs the application of payments of money when no application thereof is made by the parties, and apply the excess on the first surplus delivery to the earliest deficient delivery, and the second excessive delivery to the next insufficient one;<sup>1</sup> at least where it is not shown that the market price was higher when the first excessive delivery was made than when the earliest deficient one was.<sup>2</sup>

Where the contract is to supply an indefinite quantity of army supplies at a certain post for a specified time and no means exist by which it can be ascertained in advance how much will be required, each party owes the other the duty of exercising diligence in keeping himself and the other informed of facts which tend to lessen the uncertainty. The receiving officer may change or revoke his orders concerning the delivery of supplies any time before they are received. If he does so the government will be liable for such as the contractor had on hand ready to deliver and as to which he had incurred substantially all the cost and trouble which would have been taken if delivery had been made; as to these supplies it will be considered that he has complied with his agreement. For his preparations and progress towards furnishing other supplies, not substantially ready for delivery, he may recover the cost, expenses and losses actually incurred; but not the prospective profits.<sup>3</sup>

**§ 647. Recovery for not accepting goods.** An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale does not become a complete bargain and sale so as to vest the title in him, if he refuses to accept it. In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee to fulfill his contract,<sup>4</sup> which is ordinarily the difference between the contract price and the market value at the time and place of the breach with [360] interest.<sup>5</sup> This may be ascertained and fixed by a re-

<sup>1</sup> Johnson v. Allen, 78 Ala. 387, 394.

<sup>2</sup> Gallun v. Seymour, 76 Wis. 251.

<sup>3</sup> Field v. United States, 16 Ct. of Cls. 434.

<sup>4</sup> Allen v. Jarvis, 20 Conn. 38; Dana v. Fiedler, 12 N. Y. 48; Houston, etc.

R. Co. v. Mitchell, 38 Tex. 85; Robinson v. Varnell, 16 id. 382.

<sup>5</sup> Id.; Georgia Refining Co. v. Augusta Oil Co., 74 Ga. 497, 507; Thurman v. Wilson, 7 Ill. App. 312; Dwiggins v. Clark, 94 Ind. 49; Schramm

sale within a reasonable time, and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible.<sup>1</sup> According to some authorities, if the buyer has notice of the facts which give the vendor the right to resell and absolutely refuses to comply with his contract, notice of an intention to resell is not essential.<sup>2</sup> Such resale is made on the theory that the property is that of the vendee retained by the vendor as a means of realizing the contract price; he acts as the agent of the vendee, and deducts from the proceeds all the expenses

v. Boston Sugar Refining Co., 146 Mass. 211; Windmuller v. Pope, 107 N. Y. 674; Cullen v. Bimin, 37 Ohio St. 236; White v. Matador Land & C. Co., 75 Tex. 465; Goiss v. Wyeth & H. Manuf. Co., 37 Kan. 130; Unexcelled Fireworks Co. v. Polites, 130 Pa. St. 536; Girard v. Taggart, 5 S. & R. 19, 539; Davis v. Adams, 18 Ala. 264; Clement, etc. Manuf. Co. v. Meserole, 117 Mass. 362; Danforth v. Walker, 37 Vt. 239; Beals v. Terry, 2 Sandf. 127; Whitmore v. Coats, 14 Mo. 9; Rand v. White Mts. R. Co., 40 N. H. 79; Andrews v. Hoover, 8 Watts, 239; Gauson v. Madigan, 13 Wis. 67; Rider v. Kelly, 32 Vt. 268; Weltners v. Riggs, 3 W. Va. 445; Pickering v. Bardwell, 21 Wis. 562; Hale v. Trout, 35 Cal. 229; Dustan v. McAndrew, 44 N. Y. 72; Lewis v. Greider, 49 Barb. 606; S. C., 51 N. Y. 231; Pollen v. Le Roy, 10 Bosw. 38; S. C., 30 N. Y. 549; Bridgeford v. Crocker, 60 N. Y. 627; Mettler v. Moore, 1 Blackf. 342; Lucas v. Heaton, 1 Ind. 264; Ellison v. Dove, 8 Blackf. 571; Zehner v. Dale, 25 Ind. 433; Williams v. Jones, 12 id. 561; Young v. Mertens, 27 Md. 114; Hall v. Pierce, 4 W. Va. 107; Springer v. Berry, 47 Me. 330; Hall v. O'Hanlan, 1 Brev. 471; Clifton v. Newsom, 1 Jones' L. 108; Haskell v. McHenry, 4 Cal. 411; Nixon v. Nixon, 21 Ohio St. 114; Barr v. Logan, 5 Harr. (Del.) 52;

Hewitt v. Miller, 61 Barb. 567; Rickey v. Tenbroeck, 63 Mo. 563; McNaughton v. Cassally, 4 McLean, 530; Chapman v. Cochran, 30 Wis. 295; Marshall v. Piles, 3 Bush, 249; Camp v. Hamlin, 55 Ga. 259; Sanborn v. Benedict, 78 Ill. 539; Pittsburgh, etc. R. Co. v. Heck, 50 Ind. 303; Schnebly v. Shirtcliff, 7 Phila. 236; McNaught v. Dodson, 49 Ill. 446; Gibbons v. United States, 8 Wall. 269.

<sup>1</sup> Whitney v. Boardman, 118 Mass. 242; McEachron v. Randles, 34 Barb. 301; Williams v. Godwin, 4 Sneed, 558; Rickey v. Tenbroeck, 63 Mo. 563; Saladin v. Mitchell, 45 Ill. 79; Barr v. Logan, 5 Harr. (Del.) 52; Pollen v. Le Roy, 30 N. Y. 549; Cook v. Brandies, 3 Met. (Ky.) 555; Dustan v. McAndrew, 44 N. Y. 72; McClure v. Williams, 5 Sneed, 718; Jackson v. Covert, 5 Wend. 139; Young v. Mertens, 27 Md. 114; Hall v. O'Hanlan, 1 Brev. 471; Lewis v. Greider, 49 Barb. 606; Lamkin v. Crawford, 8 Ala. 153; Camp v. Hamlin, 55 Ga. 259; Ullman v. Kent, 60 Ill. 271; Hughes' Case, 4 Ct. of Cls. 64; Bell v. Offutt, 10 Bush, 632; Van Horn v. Rucker, 33 Mo. 391; Bigelow v. Legg, 102 N. Y. 652; Anderson v. Frank, 45 Mo. App. 482; Tufts v. Grever, 83 Me. 407; Woods v. Cramer, 34 S. C. 508.

<sup>2</sup> Waples v. Overaker, 77 Texas, 7; Ullman v. Kent, 60 Ill. 273.

incurred.<sup>1</sup> After notice of the vendor's intention to resell, no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade.<sup>2</sup> If at the time fixed for its delivery there is a market for the property the vendor cannot keep it for a rise in price at the vendee's expense.<sup>3</sup> If the net proceeds of the sale are less than the contract price, he may recover the deficiency in an action on the contract.<sup>4</sup> The vendor may, if necessary, transport the goods to another place at the expense of the vendee, for a market.<sup>5</sup> The place of resale is not necessarily restricted to that where by the contract the vendees were bound to receive the property; the vendor is authorized to exercise a reasonable discretion as to the place of sale, and may also, at the expense of the vendee, insure the property.<sup>6</sup> If there are several modes of sale open to the vendor he may adopt such as his judgment approves; if he uses diligence in pursuing the one adopted nothing more can be required of him.<sup>7</sup> Unless it is absolutely necessary he is not bound to incur any expense involving an advance of money.<sup>8</sup> If the title to the

<sup>1</sup> *Pollen v. Le Roy*, 30 N. Y. 549; *Dustan v. McAndrew*, 44 id. 72; *Westfall v. Peacock*, 63 Barb. 209; *Crooke v. Moore*, 1 Sandf. 297; *Bagley v. Findlay*, 82 Ill. 524; *Young v. Mertens*, 27 Md. 114; *Chapman v. Larin*, 4 Can. Sup. Ct. 349.

<sup>2</sup> *Id.* In *Hickock v. Hoyt*, 33 Conn. 553, it was held that where the title to property passes by a sale, and the vendor retains the possession as security for the purchase-money, and finally sells to other parties for a less price, and seeks to recover the difference from the first purchaser, it is necessary that specific notice of the time and place of sale should be given. But in a case where the contract is executory, no such notice is necessary.

<sup>3</sup> *Thurman v. Wilson*, 7 Ill. App. 312.

<sup>4</sup> *Id.*; *Springer v. Berry*, 47 Me. 330; *Williams v. Godwin*, 4 Sneed. 557; *Barr v. Logan*, 5 Harr. (Del.)

52; *Hall v. O'Hanlan*, 1 Brev. 471; *Jackson v. Covert*, 5 Wend. 139; *Boorman v. Nash*, 9 B. & C. 145; *MacLean v. Dunn*, 4 Bing. 722; *Sands v. Taylor*, 5 Johns. 395; *McClure v. Williams*, 5 Sneed, 718.

<sup>5</sup> *Sawyear v. Dean*, 114 N. Y. 481; *White v. Matador Land & C. Co.*, 75 Texas, 465; *Jackson v. Covert*, 5 Wend. 139; *Lewis v. Greider*, 51 N. Y. 231; S. C., 49 Barb. 606. *Contra*, *Chapman v. Ingram*, 30 Wis. 295; *Rickey v. Tenbroeck*, 63 Mo. 563.

<sup>6</sup> *Lewis v. Greider*, *supra*; *Waples v. Overaker*, 77 Texas, 7.

<sup>7</sup> If the sale is made at a general market for which the purchaser intended the property, he cannot object because it was not made at a nearer and less important market place. *Anderson v. Frank*, 42 Mo. App. 482.

<sup>8</sup> *Wonderly v. Holmes Lumber Co.*, 56 Mich. 412.

property has passed the vendor is not bound to resell it; it may be abandoned and the contract price be recovered.<sup>1</sup> If the refusal to accept a portion of the property is unauthorized the vendor may recover the market value of that accepted without deduction for the non-delivery of the remainder, which is excused by the vendee's act.<sup>2</sup>

§ 648. **Notice by vendee of refusal to accept goods.** It is not competent for the purchaser of property which is to be delivered in the future to impose upon the vendor the legal duty to take such steps with reference to the subject of the contract, as by at once reselling the property on the market on the buyer's account or making a forward contract for the purchase of other property of like amount, to be delivered at the same time, as shall most effectually mitigate the damages to be paid by the buyer in consequence of his refusal, though no loss would thereby result to the vendor. He is not bound to act upon a notice given by the vendee of his intention not to perform the contract. He may so act and treat the contract as at an end, and immediately bring an action for the breach; or he may await the time for its performance and hold the buyer responsible for all the consequences of his breach. If he does this, he perpetuates the contract for the latter's benefit as well as his own. If he exercises his option to terminate it, it will be his duty to make a resale of the property within a reasonable time for the buyer's benefit.<sup>3</sup> If the purchaser's notice to the vendor has been acted upon by the latter it cannot be retracted if he has changed his position.<sup>4</sup> It is a well established rule that a party to a contract which has been broken by the other party must so conduct his affairs after he has knowledge of the breach as to lessen the damage he may sustain as the result of it; and to the extent that loss can thus be avoided the vendee will be relieved

<sup>1</sup> Hunter v. Wetsell, 84 N. Y. 549.

Boorman v. Nash, 9 B. & C. 145;

<sup>2</sup> Smith v. Keith & P. Coal Co., 36 Mo. App. 567.

Cort v. Ambergate, etc. Ry. Co., 17 Q. B. 127; Ripley v. McClure, 4 Exch.

<sup>3</sup> Leigh v. Patterson, 8 Taunt. 540; Phillpots v. Evans, 5 M. & W. 475; Ripley v. McClure, 4 Exch. 359; Kadish v. Young, 108 Ill. 170; Windmuller v. Pope, 107 N. Y. 674. See

345; Reid v. Haskins, 6 E. & B. 953; Clement, etc. Co. v. Meserole, 107 Mass. 362; Smith v. Lewis, 25 Conn. 324; Haines v. Tucker, 50 N. H. 307.

<sup>4</sup> Windmuller v. Pope, 107 N. Y. Stewart v. Cauty, 8 M. & W. 160; 674.



from liability.<sup>1</sup> Thus, where the defendant contracted with [362] the plaintiff for a quantity of potatoes to be delivered during the ensuing winter, as called for by the defendant, and before they were all purchased by the plaintiff the defendant notified him not to purchase any more until further advices, it was held that this order was not a rescission of the contract, but a refusal to receive any more than the potatoes already purchased, and that the measure of damages as to the residue to be purchased when the direction was received was the difference between the price the defendant had stipulated to pay, and what it would cost the plaintiff to procure and deliver the potatoes according to the contract. The general principle was stated that in executory contracts a party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped at that point or stage in the execution of the contract.<sup>2</sup> The vendor in that case had no right, after receiving the direction to buy no more, to proceed with his purchases, and afterwards recover for loss sustained on the potatoes by frost and rot. His damages as to such after-purchases must be limited to the difference between the agreed price and what it would cost the plaintiff to procure and deliver them.<sup>3</sup>

**§ 649. Rule of damages where articles made to order.** The rule which measures the vendor's damage on the refusal to accept goods contracted for by the difference between the contract price and the market value at the time and place of the breach with interest, some courts have said, will not always afford compensation when there is a breach of a contract to accept an article which has been manufactured after a prescribed measure, pattern or style. The measure of damages in such a case is held to be the full amount of the contract price. The reason for the distinction was thus stated by Bunn, J., in a case where a water-wheel so made was not accepted: There is presumably no certain market value for goods made according to such a specific order, and the manufacturer having done all that is required of him to entitle him

<sup>1</sup> Vol. 1, § 88.

<sup>3</sup> Danforth v. Walker, 40 Vt. 357.

<sup>2</sup> Danforth v. Walker, 37 Vt. 239;  
Collins v. Delaporte, 115 Mass. 159.

to the full benefit of his contract, cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value or no appreciable value at all for any person except the one ordering it. In such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and the chances of finding a purchaser should fall upon the party who is in fault in not fulfilling his contract rather than upon the party who is in no fault and is claiming nothing but just what the other party agreed to do.<sup>1</sup> The same principle applies where the purchaser fails to give directions for the completion of an article which cannot be finished without them, and then refuses to take it. The manufacturer is not bound to complete it, make a tender of it, and on the purchaser's refusal to accept sell it in the market. He may recover the difference between the cost of making the article and the price agreed to be paid for it.<sup>2</sup> If an order for an article to be manufactured at a specified price is countermanded after labor has been put upon it and materials used in its construction, but before its completion, so long as the materials remain in the manufacturer's hands he cannot recover on the common counts for their value, nor the cost of the labor. He must sue on the special contract and claim his damages for its breach or for being wrongfully prevented from completing it. In such a case the defendant has no interest in the materials, and no concern

<sup>1</sup> *Bookwalter v. Clark*, 11 Biss. 126; *S. C.*, 10 Fed. Rep. 793; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Smith v. Wheeler*, 7 Ore. 49; *Ballentine v. Robinson*, 46 Pa. St. 177; *Scott v. Kittaning Coal Co.*, 89 id. 231; *Muskegon Co. v. Keystone Manuf. Co.*, 135 id. 132; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72. But see latter part of this section.

The rule has been applied in Massachusetts where a certificate of stock

was made in the name of the vendee. *Thompson v. Alger*, 12 Met. 428.

<sup>2</sup> *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264; *S. C.*, 17 Fed. Rep. 584; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Crescent Manuf. Co. v. Nelson Manuf. Co.*, 100 id. 325; *Cort v. Ambergate & N. Ry. Co.*, 17 Q. B. 127; *Knowlton v. Oliver*, 28 Fed. Rep. 516; *Tufts v. Lawrence*, 77 Texas, 526; *Dolph v. Troy Laundry Machine Co.*, 28 Fed. Rep. 553; *Olyphant v. St. Louis Ore & Steel Co.*, id. 729.

with the amount of labor; the plaintiff's labor is upon his own materials to increase their value for the purpose of effecting a sale to the defendant of the article ordered when completed. The law, however, will not compel the plaintiff, after such countermand, to go on and complete the article ordered before he can recover pay for what he has done, but he may treat the countermand and refusal as a prevention of performance on his part, and sue upon the contract on that ground. The value of the labor expended on the materials is not the proper criterion of the damages; for it may have enhanced their worth to the plaintiff; if so, he is to that extent compensated; but it may have diminished their value, and in that event payment for the labor will not be adequate compensation. Whether the labor has enhanced or diminished the value of the materials is a question of fact for the jury in estimating the damages.<sup>1</sup> In Maine acquiescence in the rule of damages stated in the first proposition in this section is withheld on the theory that the title to the property remains in the vendor until acceptance by the vendee. In answer to the contention that the difference between the contract price and the price which may be realized on a resale is inadequate to afford compensation because the manufactured article may be of little value to any one beside the vendee, it is observed that the less the goods are worth to sell in the market the more the plaintiff recovers, and if they are worth nothing at all, then he recovers the full contract price.<sup>2</sup>

**§ 650. Vendee's right to return property.** The recovery of damages by a vendor against a vendee for not accepting and paying for goods contracted for proceeds on the ground that the former has been ready to do his part, and has offered performance of the precedent or concurrent condition of delivering goods which will answer the requirements of the contract in all respects — in time, quality and quantity, and confer a good title.<sup>3</sup> A want of punctuality may be waived by accepting for inspection of quality after the date fixed

<sup>1</sup> *Hosmer v. Wilson*, 7 Mich. 294. 595; *Baker v. Higgins*, 21 N. Y. 397; See *Chicago v. Greer*, 9 Wall. 726. *Newberry v. Furnival*, 46 How. Pr.

<sup>2</sup> *Tufts v. Grewer*, 83 Me. 407. 139; *Byers v. Bonsall*, 3 Pittsb. 482;

<sup>3</sup> *Kirkpatrick v. Alexander*, 44 Ind. Bell v. Offutt, 10 Bush, 632.

for delivery,<sup>1</sup> and afterwards rejecting the goods on other grounds. In a contract for the sale of goods by sample the seller agrees to deliver, and the buyer to accept, goods of the same kind and quality as the sample. The identity of those sold in kind, condition and quality with the sample is of the essence of the contract.<sup>2</sup> In such cases it is the privilege of the vendee to decline and return the goods if they are found not to correspond with it.<sup>3</sup> Where the vendor delivers property on an executory contract which requires a particular quality or description, and the vendee has not had an opportunity to examine it, he may receive and retain it sufficiently long to make a fair examination, and, if found substantially inferior to that described in the contract, he may, within a reasonable time, return it to the vendor and refuse to accept it.<sup>4</sup> He may decline to receive it if not conformable to [364] the contract, by being superior to or otherwise different from the goods described therein.<sup>5</sup> If the vendee fails to give notice within a reasonable time that he declines to receive the goods because not conformable to the contract, or if he exercises ownership over them, as by selling part, he cannot afterwards repudiate the contract or refuse the goods.<sup>6</sup> If those

<sup>1</sup> *Newberry v. Furnival*, 46 How. Pr. 139.

<sup>2</sup> *Gunther v. Atwell*, 19 Md. 157; *Young v. Cole*, 3 Bing. N. C. 724; *Mondel v. Steel*, 9 M. & W. 858, 871; *Beirne v. Dord*, 5 N. Y. 95; *Hargous v. Stone*, id. 73; *Waring v. Mason*, 18 Wend. 425; 1 *Smith's Lead. Cas.* (5th ed.) 256 *et seq.*

<sup>3</sup> *Id.*; *Field v. Kinnear*, 4 Kan. 476; *Beebee v. Robert*, 12 Wend. 413; *Brantley v. Thomas*, 22 Tex. 270; *Bradford v. Manly*, 13 Mass. 139.

<sup>4</sup> *Wolf v. Dietsch*, 75 Ill. 205; *Haase v. Nonnemacher*, 21 Minn. 486; *Knoblauch v. Kronschnabel*, 18 id. 300; *Cahen v. Platt*, 40 N. Y. Super. Ct. 483; *Neaffie v. Hart*, 4 Lans. 4.

<sup>5</sup> *Newmarket Iron F. v. Harvey*, 23 N. H. 395.

<sup>6</sup> *McFadden v. Wetherbee*, 63 Mich. 390; *Watkins v. Paine*, 57 Ga. 50; *Wolf v. Dietsch*, 75 Ill. 205.

In *Kidd v. Belden*, 29 Barb. 266, it appeared that the plaintiff had manufactured and put into the defendant's steamboat a boiler, engines and other machinery, under a contract by which he was to be paid a certain specified price, a portion of which was to be secured by a chattel mortgage upon the property, to be executed by the defendant when the plaintiff had completed his contract. After the engine and boiler had been placed and partially fastened in the boat, but before the work was completed or ready to be delivered, the defendant clandestinely went off with the boat to Canada, and, on his return, refused either to execute the mortgage, pay for the machinery or permit the plaintiff to remove it. In replevin by the plaintiff, the jury having found that there had been no absolute and unconditional delivery



sent upon a contract or order, when received, are found to be inferior, or otherwise not conformable to the contract, and the vendee rejects them after having paid freight, or incurred other expenses in obtaining the temporary possession, he has a claim on the vendor for reimbursement.<sup>1</sup> And if they are of a kind which must be used to ascertain their quality and a test proves that they are inferior to those ordered, the purchaser cannot be charged for the quantity necessarily used for that purpose if he promptly rejects the remainder on being assured of that fact.<sup>2</sup>

## SECTION 2.

### VENDEE AGAINST VENDOR.

**§ 651. Recovery for non-delivery of property contracted [365] for.** The breach of contract now to be considered is that of a vendor who has violated his executory agreement to sell goods or other property of a personal nature by not delivering it. The same rule or measure of damages will not apply where there is a sale of specific property and the vendor subsequently refuses to deliver it. The general rule is, where payment and delivery are concurrent acts, and the vendor refuses to deliver, that the vendee is entitled to recover as dam-

of the machinery to defendant, nor such an annexation of it that it could not be removed without injury to the boat, it was held that plaintiff had not lost his title to the property, but might maintain the action. It was also held that in estimating the damage the plaintiff had sustained the jury were to be governed by the value of the machinery as established by the parties in their contract, so far as it could be applied; and that its value was to be assessed in the condition it was at the time of the demand. The defendant was not permitted to show, in mitigation of damages, that the machinery was not placed in the boat in a workmanlike manner. He was concluded by his election to take the work in its unfinished condition,

and held to have accepted the job as finished, and to have waived all objection on account of defects. It was held that the defendant could not be allowed to show, in mitigation of damages, what would be the value of the machinery detached from the boat. The plaintiff's labor in putting it into the boat entered into and formed part of the value to be assessed by the jury.

<sup>1</sup> Rucker v. Donovan, 13 Kan. 251; Coit v. Schwartz, 29 id. 344; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29 (also cost of insurance); Barnett v. Terry, 42 Ga. 283.

<sup>2</sup> Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29.

ages the difference between the contract price and the market value of the goods at the time and place appointed for delivery and interest.<sup>1</sup> If earnest money paid was to be applied

<sup>1</sup>Cole v. Cheovenda, 4 Colo. 17; Capen v. De Steiger Glass Co., 105 Ill. 185; Young v. Cureton, 87 Ala. 727; Trunkey v. Hedstrom, 131 Ill. 204; Buckley v. Holmes, 19 Ill. App. 530; Wire v. Foster, 62 Iowa, 114; Osgood v. Bauder, 75 id. 550; Black v. De Camp, 78 id. 718; Faulkner v. Closter, 79 id. 15; Gray v. Hall, 29 Kan. 704; Crawford v. Geiser Manuf. Co., 88 N. C. 554; West Republic Mining Co. v. Jones, 108 Pa. St. 55; Ullman v. Babcock, 63 Texas, 68; Koch v. Godshaw, 12 Bush, 318; Harris v. Rodgers, 6 Heisk. 626; Pinckney v. Dambmann, 72 Md. 173; Coit v. Schwartz, 29 Kan. 344; Rahm v. Deig, 121 Ind. 283; Sweeney v. Jamieson, 2 Wash. Ty. 254; Bush v. Holmes, 53 Me. 417; Furlong v. Polleys, 30 id. 491; Smith v. Berry, 18 id. 122; Warren v. Wheeler, 21 id. 484; Berry v. Dwinel, 44 id. 255; Randon v. Barton, 4 Tex. 289; Kemp v. Knickerbocker Ice Co., 51 How. Pr. 31; Norton v. Wales, 1 Robt. 561; Williamson v. Dillon, 1 H. & G. 444; Duncan v. McMahon, 18 Tex. 597; Fessler v. Love, 48 Pa. St. 407; Gilpin v. Consequa, 3 Wash. C. C. 184; Kipp v. Wiles, 3 Sandf. 585; Bartlett v. Blanchard, 13 Gray. 429; Clark v. Pinney, 7 Cow. 681; Currie v. White, 7 Robt. 637; Northrup v. Cook, 39 Mo. 208; Somers v. Wright, 115 Mass. 292; Worthen v. Wilmot, 30 Vt. 555; Doak v. Snapp, 1 Cold. 180; Blackwood v. Brennan, 1 Harp. 144; Hinde v. Liddell, 32 L. T. (N. S.) 449; L. R. 10 Q. B. 265; Paine v. Sherwood, 21 Minn. 225; Miles v. Miller, 12 Bush, 134; Giles v. Morrison, 50 Barb. 50; Yorke v. Ver Planck, 65 id. 316; Brown v. Muller, L. R. 7 Exch. 319; Pendergast v. Reed, 29 Md. 398; Camp v. Hamlin, 55 Ga. 259; Dana v. Fiedler, 12 N. Y. 40; Watrous v. Bates, 5 Up. Can. C. P. 366; Baker v. John, 2 Robt. 570; Woodworth v. Curtis, 7 Wend. 112; Ruiz v. Norton, 4 Cal. 355; Crosby v. Watkins, 12 id. 85; Burnham v. Roberts, 70 Ill. 19; Davis v. Shields, 24 Wend. 322; Sanborn v. Benedict, 78 Ill. 309; Duncan v. Post, 3 Cal. 373; Pittsburg, etc. Co. v. Heck, 50 Ind. 303; Harrolson v. Stein, 50 Ala. 347; Hill v. Smith, 32 Vt. 433; Hamilton v. Ganyard, 34 Barb. 204; Parsons v. Sutton, 66 N. Y. 92; Stewart v. Power, 12 Kan. 596; Boies v. Vincent, 24 Iowa, 387; Clark v. Daley, 20 Barb. 42; Havemeyer v. Cunningham, 35 Barb. 515; Brent v. Richards, 2 Gratt. 539; Meserve v. Ammidon, 109 Mass. 415; Shepherd v. Hampton, 3 Wheat. 200; Fishill v. Winans, 38 Barb. 228; Dey v. Dox, 9 Wend. 129; Gregory v. McDowell, 8 id. 435; Boorman v. Nash, 9 B. & C. 145; Barrow v. Arnaud, 8 Q. B. 604; Valpy v. Oakeley, 16 id. 941; Josling v. Irvine, 6 H. & N. 512; Chinery v. Viall, 5 id. 288; Griffiths v. Perry, 1 E. & E. 680; Peterson v. Ayre, 13 C. B. 353; Donald v. Hodge, 5 Hayw. 85; Connell v. McClean, 6 Harr. & J. 297; Kitzinger v. Sanborn, 70 Ill. 146; Wilson v. Lancashire, etc. Ry. Co., 9 C. B. (N. S.) 632; Orr v. Bigelow, 14 N. Y. 556; Stanton v. Small, 3 Sandf. 230; Beals v. Terry, 2 id. 127; Lattin v. Davis, Hill & Denio, 9; Bailey v. Clay, 4 Rand. 346; Mallory v. Lord, 29 Barb. 454; Cahen v. Platt, 69 N. Y. 348; Brackett v. McNair, 14 Johns. 170; Gordon v. Norris, 49 N. H. 376; Stevens v. Lyford, 7 id. 360; West v. Pritchard, 19 Conn. 212; Shaw v.

to the purchase price it may be recovered,<sup>1</sup> and so may money paid to a third person in pursuance of the contract.<sup>2</sup>

[366] If a contract is for a cargo, or for all the goods of a specified description in a given vessel, the vendee is not entitled to recover damages on the basis of what they are worth in broken parcels.<sup>3</sup> Nor will this general standard of damages be departed from though one or both of the parties were mistaken in respect to material facts affecting the market price. Thus, in an action against a vendor for not delivering goods the court say: "The relation of buyer and seller is not a confidential one, and each of the parties is supposed to judge of his ability to perform his part for himself;" declarations of the plaintiff that he knew at the time of making the contract that the article contracted for could not be procured were not admissible in evidence to mitigate the damages. A contract to perform an impossible thing may be void; but it is never impossible to procure and deliver an article of commerce which may be had in the market in some quarter of the world.<sup>4</sup> So, where alcohol was contracted to be delivered on board a vessel under the tax law from August 20 to August 31, 1862, duty paid at a fixed price, the subsequent suspension, until after the time fixed for delivery, of an act of congress which practically rendered alcohol sold for exportation duty free did not relieve the vendor from the obligation to make delivery according to his contract, although such suspension was not contemplated by the parties.<sup>5</sup> But where goods are sold in close packages, [367] and there is a mutual mistake of the parties as to the quantity, it will be corrected in an action between them on the basis of the purchase price.<sup>6</sup>

If a purchaser for a price below the market agrees that should he desire to sell the property he will sell it back to his vendor at the same price, and afterwards sells to another for more than the market price, he will be liable on his agreement for the difference between the amount he paid and the sum he

Nudd, 8 Pick. 9; Quarles v. George, 23 id. 400; Davis v. Richardson, 1 Bay, 105; Whitmore v. Coates, 14 Mo. 9. See Harrison v. Charlton, 37 Iowa, 134.

<sup>1</sup> Joyce v. Adams, 8 N. Y. 291; Gossard v. Woods, 98 Ind. 195.

<sup>2</sup> Bullard v. Stone, 67 Cal. 477.

<sup>3</sup> Duncan v. Post, 3 Cal. 373.

<sup>4</sup> Myers v. Drake, 10 Watts, 110.

<sup>5</sup> Baker v. Johnson, 2 Robt. 570.

<sup>6</sup> Hargous v. Ablon, 3 Denio, 406.

sold for.<sup>1</sup> This rule of damages, the difference between the contract and the market price, is founded on the consideration that the articles withheld are worth the market price to the vendor, and the vendee may immediately after the breach of the contract go into the market and supply himself at the market price, and having done so, he is in as good condition as if the contract had been performed.<sup>2</sup> If the property cannot be purchased in the market where the delivery was to be made the vendee may go in to the nearest market and buy, and add the cost of transportation to the purchase price.<sup>3</sup>

§ 652. **The same subject.** The agreement may relate to property which may not be found in the market, and can only be produced at an expense greatly above the contract price. In such a case it has been held that if the course pursued by the purchaser in obtaining other like property, as timber for example, was the only way it could be obtained; or was a reasonable and prudent way of obtaining it, irrespective of any special use or exigence, the difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser as damages naturally arising from the breach itself.<sup>4</sup> The recovery is governed [368] by the market price, if there be one, although it may be enhanced by the fact that the article is patented, and the right to sell held exclusively by the vendor. The vendee has a right

<sup>1</sup> *Brent v. Richards*, 2 Gratt. 539; *Duncan v. McMahon*, 18 Tex. 597.

<sup>2</sup> *Frink v. Tatman*, 36 Ind. 259; *Beard v. Straw*, 38 id. 128; *Dana v. Fiedler*, 12 N. Y. 40; *Furlong v. Polleys*, 30 Me. 493; *Deere v. Lewis*, 51 Ill. 254; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Wire v. Foster*, 62 Iowa, 114. See *Alder v. Keighley*, 15 M. & W. 117.

An instruction to the jury in an action for breach of a contract to sell and deliver lumber that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery is erroneous. The true measure is the difference between the contract price

and what it would have cost the plaintiff to procure, at the place of delivery and at the time or times when it was reasonable and proper to supply themselves, lumber of the kind and quantity they were to receive on the contract; and, if it were impracticable for them thus to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants. *Haskell v. Hunter*, 23 Mich. 305.

<sup>3</sup> *Capen v. De Steiger Glass Co.*, 105 Ill. 185; *Vickery v. McCormick*, 117 Ind. 594.

<sup>4</sup> *Paine v. Sherwood*, 21 Minn. 225; S. C., 19 id. 215; *Hinde v. Liddell*, L. R. 10 Q. B. 265.



to the benefit of the patent in whatever degree it entered into the market value of the article.<sup>1</sup> Where the contract is for the sale of property which has no market value it is presumed that the parties have bargained with that fact in view; if the vendee cannot supply himself in the market he may recover the amount lost by reason of not receiving an advance or profit through agreements which he has made in reliance upon the fulfillment by the vendor of his contract.<sup>2</sup> If resort is necessarily had to an inferior article for use in manufacturing in order to fill contracts, the resulting damage may be recovered, so far as it proceeds from experiments which it was prudent to make.<sup>3</sup> Knowledge of the fact that the article sold is not obtainable has the same effect to make the vendor liable for consequential losses as his knowledge of pre-existing contracts made by the vendee has to make him so liable when the market furnishes the needed article. The amount reasonably expended by a purchaser to avert the loss impending because of the non-delivery of goods which are not procurable in the market may be recovered.<sup>4</sup> Thus, where the defendant had contracted to supply to the plaintiff two thousand pieces of gray shirting to be delivered on the 20th day of October certain, at so much per piece, and was informed that the property was intended for shipment, and shortly before the 20th of October notified the plaintiff that he would not be able to complete his contract, whereupon the plaintiff endeavored to get the shirting elsewhere, but, being unable to do so, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirting of a somewhat superior quality at an increase of price, the sub-vendee, having accepted the substitute, but paying no advance in price to the plaintiff, he sued to recover against the defendant, for the breach of his contract, the difference between what he paid for the substituted shirting and the price contracted to be paid to him. It appeared that the shirting which the plaintiff bought was the nearest in quality and price that could be got by the 20th of October, and it was held that, there being no

<sup>1</sup> Frink v. Tatman, 36 Ind. 259.

520; Culin v. Woodbury Glass Works,

<sup>2</sup> McKay v. Riley, 65 Cal. 623; 108 Pa. St. 220.

Loescher v. Deisterberg, 26 Ill. App.

<sup>3</sup> McHose v. Fulmer, 73 Pa. St. 365.

<sup>4</sup> Vol. 1, § 89.

market for the article contracted for, the measure of damages was the value at the time of the breach, and the plaintiff, having done the best thing he could, was entitled to recover the difference in the price.<sup>1</sup> In *Barker v. Mann*,<sup>2</sup> after sale of specific goods, the vendors refused to make delivery and gave immediate notice to the vendee to that effect. The court say, by Williams, C. J.: "In this case the appellants promptly informed the appellees of their intention to abandon the sale, and there is no reason assigned or appearing why they could not procure a supply of the same articles within a few [369] days from other vendors in the L. market [where the transaction took place]. Had they done so, their necessary expense, together with their time and trouble, and any possible advance in the price of such goods at L. which they would have had to pay, should be regarded as elements making up their damages."<sup>3</sup> A vendee is not bound to go into a foreign market and procure other goods until the vendor has given him notice that he will not fulfill his contract.<sup>4</sup>

Where the general rule concerning the market price applies the jury cannot give damages in excess of it, though the refusal to deliver may have been made with a view to profit.<sup>5</sup> But it is said if the price was not fixed, and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate according to the conduct of the defendant.<sup>6</sup> It is the market price, when there

<sup>1</sup> *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Haskell v. Hunter*, 23 Mich. 305.

<sup>2</sup> 5 Bush, 672.

<sup>3</sup> See *Taylor v. Reed*, 4 Paige, 561; *Feehan v. Hallinan*, 13 Up. Can. Q. B. 440.

It is for the defaulting seller who has given the buyer notice that he will not deliver to show that the latter could have purchased the article in the market where the delivery was to have been made. *York-Draper M. Co. v. Lusk*, 45 Kan. 182.

<sup>4</sup> *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *Shouse v. Neiswanger*, 18 Mo. App. 236.

<sup>5</sup> *Blydenburgh v. Welsh*, 1 Baldw.

331. See *Grand Tower Co. v. Phillips*, 23 Wall. 471.

<sup>6</sup> *Id.* *Hopkinson, J.*, vindicating this rule, upon a motion for a new trial for excessive damages, said: "In assessing the damages for the breach of a contract [for the sale and delivery of coffee], the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a rule as could be given. The damage to be recovered is to be governed by the price of the article at the time when it should have been delivered, compared with

is one, at the date of the breach which governs in the estimate of damages. Whether the contract fixes a day for the delivery or allows a reasonable time, delay of the vendor, al-

the contract price. This rule is founded on an hypothesis, not always true in fact, perhaps not often so, and very favorable to the plaintiff, that is, that he would certainly have sold the article, if he had received it, at the advance of that day, and not have retained it subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of the coffee on the day the defendant was bound to deliver this parcel to the plaintiff, we must settle the true meaning or interpretation of the rule, what is intended by the *price* of the article? On the one side it is contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract, and put into his possession the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be anything unjust in this rule — anything of which any one has a right to complain who has broken his engagements. But is it the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price — the *market price* of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the *value* — the rate at which the thing is sold. To make a market

there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour for instance, under a false rumor, which if true would augment its value, may suspend their sales, or put a price upon it, not according to its value in the *actual* state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance. The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter.

“With this explanation of the rule which prescribes the market price of the article on the day of delivery, we must examine whether the jury in this case have executed it clearly in the verdict which they have rendered.

though by consent, but without any valid agreement for such delay which would preclude the purchaser from bringing an action at once, does not extend the time so that an advance

It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff, on the 14th of April, [371] 1825, at nineteen and three-fourths cents a pound. Does the evidence support this calculation or estimate for such coffee on so large a quantity on that day? Was this the buying and selling price? We feel, as the jury probably did, no inclination to force the testimony in favor of the defendant; on the contrary, his unaccounted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him a profitable, contract, was calculated to induce the jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff has been given up at the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to [the vendor] a sordid design, we confess ourselves unable to discover the cause of his departure from the course it was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the application of it to the evidence. Juries may sometimes yield honestly to excitements, which judges must not feel. To correct

such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury that we would not oppose ourselves to their opinion upon it unless where we were assured that they have either mistaken the rule of law or contradicted the clear purport of the evidence. We inquire, then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April, 1825? . . .

"There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th, inclusive, which, in our minds, show such an advance as would have raised the value [372] of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them. . . . It is enough that we think the jury have so far overrated the value of this coffee as to support the objection of excessive damages to their verdict. It is not unlikely that they may not have exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the refusal of the defendant to perform his contract to be wilful or inadvertent; proceeding from an unjust vio-



in the market price meanwhile can be considered in computing damages on a failure to deliver after such delay.<sup>1</sup> And

lation of his engagement, or a conscientious although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it, substituting a fictitious, unreal value which nobody would give, for that at which the article might be bought and sold. It has grown into a proverb that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it." *Blydenburgh v. Welsh*, *Baldw.* 331.

<sup>1</sup>*Pinckney v. Dambmann*, 72 Md. 173; *Norton v. Wales*, 1 Robt. 561; *Sleuter v. Wallbaum*, 45 Ill. 43. Compare *Hickman v. Haynes*, L. R. 10 C. P. 598; *Williams v. Woods*, 16 Md. 220; *Hill v. Smith*, 34 Vt. 433; *S. C.*, 34 id. 535; *Ogle v. Earl Vane*, L. R. 3 Q. B. 272; 2 id. 275.

In *Hickman v. Haynes*, L. R. 10 C. P. 598, the plaintiff agreed in writing to deliver and the defendant to accept property at a specified date. The delivery was postponed pursuant to defendant's requests. In an action to recover for non-acceptance pursuant to the written contract the defendant contended that because of the verbal arrangement, made before there was a breach of the original contract, there could not be a recovery upon the latter, on the ground that there was never any readiness and willingness to make delivery. It was held that the true effect of the verbal arrangement was that the plaintiff voluntarily with-

held delivery at defendant's request; that no new contract resulted; plaintiff was entitled to recover damages estimated at the market price of the property at a reasonable time after the last request of the defendant to withhold delivery.

It is said in *Smith v. Snyder*, 77 Va. 432, that where the time for performing a contract of sale is postponed at the request of either party and is ultimately broken, the period at which the breach takes place is deferred until the final refusal to deliver.

If the property is to be furnished as needed the vendee may go into the market and supply himself as his necessities may require unless it is shown that he might have contracted for deliveries according to the vendor's contract. *Long v. Conklin*, 75 Ill. 32.

If no time is fixed for delivery the market value will be estimated as of the time of the refusal to deliver. *Guice v. Crenshaw*, 60 Texas, 344. And so if the delivery has been postponed from time to time. *Roberts v. Benjamin*, 124 U. S. 64.

Where the delivery is to be made on or about a stated time the market price within a reasonable time after the date named governs. *Kipp v. Wiles*, 3 Sandf. 585.

If the delivery is made in instalments, but not according to the contract, and the property is received without protest or inducement, the market price will be determined as of the dates the shipments were received. *West Republic Mining Co. v. Jones*, 108 Pa. St. 55.

Growing crops are deliverable at their maturity (*Smock v. Smock*, 37 Mo. App. 56); or when they can be

the market value at the place of delivery is that which [373] must fix the measure of damages.<sup>1</sup>

§ 653. **Same subject.** In the absence of a market at that place the value there is to be ascertained; this may be done by proving the market price at the nearest point where the goods of the quantity in question could be bought or sold, with such addition or deduction of the cost of transportation as will be necessary to determine the value at the place of delivery depending on its relation to the controlling market of sale.<sup>2</sup> For the purpose of showing the plaintiff's loss from non-fulfillment of the contract, he is not confined to any particular species of evidence to prove the value of the property at the place of delivery. He may show it by the market price there, if there have been sales enough to make such a price; or he may show its value at the market where such commodities are usually sent for sale, and the cost of transportation from the place of delivery.<sup>3</sup> There may be a custom

harvested with ordinary diligence. *Harris v. Rodgers*, 6 Heisk. 626.

<sup>1</sup> *Myer v. Wheeler*, 65 Iowa, 390; *Merritt v. Wittich*, 20 Fla. 27; *Adams v. Sullivan*, 100 Ind. 8; *McCormick v. Jensen*, 29 Neb. 102; *Phelps v. McGee*, 18 Ill. 155; *Deere v. Lewis*, 51 id. 254; *Barker v. Mann*, 5 Bush, 672; *McKenney v. Haines*, 63 Me. 74; *Young v. Lloyd*, 65 Pa. St. 199; *Hill v. Canfield*, 56 id. 454; *Gregory v. McDowell*, 8 Wend. 435; *Grand Tower Co. v. Phillips*, 23 Wall. 471.

Evidence as to the market price need not be restricted to property equal in quantity to that in question. It is not of substantial importance whether the supply is obtained from one or repeated purchases. *Faulkner v. Closter*, 79 Iowa, 15.

Expenses incurred by the vendee in sending an agent to the vendor on account of the purchase are not recoverable. *Crawford v. Geiser Manuf. Co.*, 88 N. C. 554.

<sup>2</sup> *Capen v. De Steiger Glass Co.*, 105 Ill. 185; *White v. Matador Land Co.*, 75 Texas, 465, quoting the text;

*Johnson v. Allen*, 78 Ala. 387; *Barry v. Cavanagh*, 127 Mass. 394; *Berry v. Dwinel*, 44 Me. 255; *Furlong v. Polleys*, 30 id. 491; *Washington Ice Co. v. Webster*, 68 id. 463; *Rice v. Manley*, 66 N. Y. 82; *Harris v. Panama R. Co.*, 58 id. 660; *Gregory v. McDowell*, 8 Wend. 435; *McHose v. Fulmer*, 73 Pa. St. 365.

<sup>3</sup> *McDonald v. Unaka Timber Co.*, 88 Tenn. 38; *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185; *Stevens v. Lyford*, 7 N. H. 360; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Hanson v. Lawson*, 19 Kan. 201; *Hazelton Coal Co. v. Buck Mt. Coal Co.*, 57 Pa. St. 301; *Sellar v. Clelland*, 2 Colo. 532; *Wemple v. Stewart*, 22 Barb. 154; *Muller v. Eno*, 14 N. Y. 597; *Durst v. Burton*, 37 id. 167.

If there is no general market in the place of delivery for raw material bought for manufacturing purposes, and the cost of transportation from the place where there is such a market will largely exceed the contract price, the market value may be arrived at by deducting the cost of

of a particular trade so long and well established that the parties may be presumed to have contracted with that in view. If according to such a custom the damages are measured by the market price at the place of shipment the courts will give it effect.<sup>1</sup> If the vendor knows when he makes his contract that the property is to be sold in another market his liability is measured by adding to the contract price at the agreed time and place of delivery the cost of transporting the property to such market, less the price there at the time it would have reached its destination if there had been no breach.<sup>2</sup> Where the inquiry is properly confined to the ascertainment of the actual value at the place and time of delivery, it is not admissible to inquire as to the probable effect of adding the goods in question to the quantity in market;<sup>3</sup> nor of the [374] plaintiff's going into the market to buy goods of the kind and in the quantity contracted for and not delivered.<sup>4</sup>

If the market is fluctuating, and especially if it be raised or depressed by transient causes, or by interested and illegitimate combinations, for temporary, special and selfish objects, independently of the influences of lawful commerce, the market price on the precise day of delivery will not necessarily

manufacturing and of such material from the market value of the manufactured article. *Equitable Gas Light Co. v. Baltimore Coal Tar & Manuf. Co.*, 65 Md. 73.

<sup>1</sup> *Haas v. Hudmon*, 83 Ala. 174.

<sup>2</sup> *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *Hendrie v. Neelon*, 12 Ont. App. 41; S. C., 3 Ont. 603; *Louis Cook Manuf. Co. v. Randall*, 62 Iowa, 244; *McCormick H. Co. v. Jensen*, 29 Neb. 102.

<sup>3</sup> *Dana v. Fiedler*, 12 N. Y. 40. In this case questions to witnesses had been excluded. Referring to them *Johnson, J.*, said: "The evident object of all these inquiries was to show that if the defendant had performed, and the plaintiff had desired to sell the whole quantity [one hundred and fifty tons of madder], the market price would have been lowered by throwing so large a quantity

at once upon the market. A sufficient answer to all these exceptions is that they are founded upon an attempt to substitute a hypothetical market value for the actual market value. They call upon the jury to speculate as to the consequences which would have resulted to the plaintiff if the defendant had performed his contract. The rule of damages was correctly laid down by the court (*Clark v. Pinney*, 7 Cow. 681; *Dey v. Dox*, 9 Wend. 129; *Davis v. Shields*, 24 id. 322), and the market value of the article on the day of delivery, which that rule fixes as a test, requires an investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist."

<sup>4</sup> *Jennison v. Gray*, 29 Iowa, 537.

govern. The law in regulating the measure of damages contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time.<sup>1</sup> Where there is a stimulated market price, created by artificial or fraudulent practices, it is not the true or only test of value. The market price being only evidence of value, the law adopts it as a natural inference of fact and not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing.<sup>2</sup> In such cases, what is called the market price, or the quotations of the articles for a given day, is not the only evidence of value; the true value may be drawn from other sources.<sup>3</sup>

The defaulting vendor cannot be charged with more than that price merely because the vendee had a contract for resale at a higher price;<sup>4</sup> nor can he claim any mitigation where the vendee has contracted for a resale at less than the market price.<sup>5</sup> But if the vendor sells the goods which he contracted, the party to whom they were bargained may recover on the basis of the amount the vendor has sold for.<sup>6</sup> Where [375] the market price is less than the contract price at the date when the contract requires delivery, the vendee can suffer no actual injury; he is, however, entitled to nominal damages.<sup>7</sup> If the vendor sells a part of the goods to another purchaser, and thus puts it out of his power to perform his contract, the vendee, if he has received none of the property, is entitled to the difference between the contract and the market price of all the goods purchased, and not merely of those which the vendor has sold to another.<sup>8</sup> Where by the terms of a con-

<sup>1</sup> *Adams v. Sullivan*, 100 Ind. 8, quoting the text; *Smith v. Griffith*, 3 Hill, 333; *Durst v. Burton*, 47 N. Y. 167; *Cahen v. Platt*, 69 id. 343.

<sup>2</sup> *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Muller v. Eno*, 14 N. Y. 597. See *Trout v. Kennedy*, 47 Pa. St. 387.

<sup>3</sup> *Id.*

<sup>4</sup> *Williams v. Reynolds*, 6 B. & S. 495; *Cole v. Swanston*, 1 Cal. 51. But see *Trigg v. Clay*, stated in § 000.

<sup>5</sup> *Josling v. Irvine*, 6 H. & N. 512.

<sup>6</sup> *Peterson v. Ayre*, 13 C. B. 353; *Gainsford v. Carroll*, 2 B. & C. 624.

<sup>7</sup> *Rose v. Bozeman*, 41 Ala. 678; *Bush v. Canfield*, 2 Conn. 485; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680; *Maher v. Riley*, 17 Cal. 415; *Wire v. Foster*, 62 Iowa, 114; *Harrison Wire Co. v. Hall & W. H. Co.*, 97 Mo. 289.

<sup>8</sup> *Crist v. Armour*, 34 Barb. 378.

In *Somers v. Wright*, 115 Mass. 292, A. agreed to sell by warranty deed a



tract between the owner of property and another it is agreed that the latter is not a purchaser of the property, but is to sell it, and to account to the owner for the avails of the sales at a certain rate, the rule of damages as between vendor and vendee does not apply.<sup>1</sup>

§ 654. **Proof of value.** The proof of value is generally by the judgments or opinions of witnesses.<sup>2</sup> If the article in question has a market price, that will usually control as the best evidence of its value.<sup>3</sup> If this test has been applied by an [376] actual sale of it the fact may be proved as evidence of its value.<sup>4</sup> It is not conclusive, but tends to show its value, and in the absence of other evidence would suffice.<sup>5</sup> Even the amount goods cost is admissible for the same purpose.<sup>6</sup> When the cost was the price at which a regular dealer in such articles had sold it when new, in the ordinary course of trade, it is evidence of the market value; and if afterwards deteriorated by use, like furniture, its present value can be ascertained by reference to the former price and the extent

lot of land to B. for a certain sum, payable in lumber "at current retail prices." A. bound himself to discharge an existing mortgage on or before a certain day, and it was also agreed that B. should not pay the lumber agreed upon as the price above the amount of the mortgage, computed at the current retail prices, until the discharge of such mortgage. A. did not discharge the mortgage, and B. paid it to prevent a foreclosure. It was held that B., in an action on A.'s contract to discharge the mortgage, was entitled to recover the loss of profits which would have accrued by the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber.

In *Harrison v. Charlton*, 37 Iowa, 134, C. bought of H. a lumber yard, the stock to be invoiced and delivered at a future day, and H. in the meantime to make no additions thereto. H. made additions, which were un-

knowingly included and paid for by C. Held, the measure of damages was the difference between the price paid by him for the additional lumber and the market price at which he could have purchased the same.

<sup>1</sup> *Giles v. Morrison*, 50 Barb. 50.

<sup>2</sup> Vol. 1, § 445.

<sup>3</sup> *Cahen v. Platt*, 69 N. Y. 348; *Durst v. Burton*, 47 id. 167. See *Parks v. Morris Ax & T. Co.*, 54 id. 586.

<sup>4</sup> *Muller v. Eno*, 14 N. Y. 597; *Deck v. Feld*, 38 Mo. App. 674; *Stevens v. Springer*, 23 id. 375.

<sup>5</sup> *Id.*; *Rach v. Levy*, 101 N. Y. 511; *Trustees of Howard College v. Turner*, 71 Ala. 429 (sale of college scholarship).

<sup>6</sup> *Smith v. Griffith*, 3 Hill, 333.

When the sale is made by a manufacturer to a purchaser who has ordered the goods, the price agreed upon is presumably the market value. *Geiss v. Wyeth H. & Manuf. Co.*, 37 Kan. 130.

of depreciation.<sup>1</sup> So proof of the amount it sold for at auction has been admitted.<sup>2</sup> Witnesses having the requisite knowledge may testify as to market prices. In doing so they testify to facts rather than opinions. It is knowledge more or less special, though it is largely, and may be exclusively, hearsay.<sup>3</sup>

Market prices themselves are the estimate or opinion of those who influence the market; that opinion is expressed in actual transactions; and it is a knowledge of these, in such form as is usually relied on, which qualifies the witness to testify. Such a witness — that is, one who has thus informed himself in respect to market prices which are relevant, and not presumed to be within the actual knowledge of all jurors — may testify to them though he knows nothing of the property in question.<sup>4</sup> He may be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates, and has not heard all the evidence given in the case.<sup>5</sup>

Merchandise brokers in Boston, and members of firms doing business and having houses established in Boston and New York, who are familiar with the market of a particular [377] line of goods in New York, and whose information is derived from the daily price-current lists, and returns of sales daily furnished them in Boston from their New York houses, may testify to such value in the latter market at a given time.<sup>6</sup> The market price of a marketable commodity may be determined as well by offers to sell, made by dealers in the usual

<sup>1</sup> *Luse v. Jones*, 39 N. J. L. 707; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.*, 17 L. R. A. 33 (Fla.).

<sup>2</sup> *Cronnse v. Fitch*, 14 Abb. 346. See *Bissell v. Starr*, 32 Mich. 297; *Willamet Falls C. & L. Co. v. Kelly*, 3 Ore. 99; *Wilson v. Holden*, 16 Abb. 133.

<sup>3</sup> *Harrison v. Glover*, 72 N. Y. 451; *Washington Ice Co. v. Webster*, 68 Me. 463; *Whitney v. Thatcher*, 117 Mass. 523; *Lush v. Druse*, 4 Wend. 313; *Savercool v. Farwell*, 17 Mich. 308; *Cliquot's Champagne*, 3 Wall. 114; 1 Whart. Ev., §§ 446, 449; *Stone v. Covell*, 29 Mich. 359.

<sup>4</sup> *Miller v. Smith*, 112 Mass. 475; *Beecher v. Denniston*, 13 Gray, 354; *Fitchburg R. Co. v. Freeman*, 12 id. 401; *Brady v. Brady*, 8 Allen, 101; *Lawton v. Chase*, 108 Mass. 238; *McCullum v. Seward*, 62 N. Y. 316; *Reynolds v. Robinson*, 64 id. 589.

<sup>5</sup> *Woodbury v. Obear*, 7 Gray, 467; *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169, 172; *Cornell v. Dean*, 105 Mass. 435; *Browne v. Moore*, 32 Mich. 254. See vol. 1, § 446.

<sup>6</sup> *Whitney v. Thatcher*, 117 Mass. 523.

course of business, as by actual sales; and statements of dealers, in answer to inquiries as to price, are competent evidence.<sup>1</sup> A price-current published in a newspaper is not competent evidence of market value, without proof as to the sources from which the information which formed its basis was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given to the paper must depend upon such extrinsic proof; it cannot be determined by the publication itself.<sup>2</sup> An unaccepted offer, as an isolated transaction, is not competent evidence upon the question of value. But in a market regularly attended by buyers and sellers, an offer as well as a sale of an article of recognized uniform character, constantly bought and sold there, so as to have a place on the daily price-current list, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market makes the fact one that may properly be considered in evidence.<sup>3</sup>

Whether the very property to be valued corresponds with that to which the market prices apply is a matter of judgment. A witness who has knowledge of market values and [378] knows the property in question may give his opinion of its value.<sup>4</sup> Every one is supposed to have some idea of the value of such property as is in general use; it is not necessary

<sup>1</sup> *Harrison v. Glover*, 72 N. Y. 451.

<sup>3</sup> *Whitney v. Thacher*, 117 Mass.

<sup>2</sup> *Whelan v. Lynch*, 60 N. Y. 469.

523.

In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article and examined their books, thus giving the sources of his knowledge. In *Cliquot's Champagne*, 3 Wall. 114, it appeared that the price-current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. See vol. 1, § 447.

<sup>4</sup> *Id.*; *Brill v. Flagler*, 23 Wend. 354; *Parks v. Morris Ax & T. Co.*, 54 N. Y. 593; *Kellogg v. Krauser*, 14 S. & R. 137; *Haskell v. Mitchell*, 53 Me. 468; *Whiteley v. China*, 61 Me. 199; *Snow v. Boston & M. R.*, 65 Me. 230; *Shattuck v. Stoneham, etc. R.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Kronschnable v. Knoblauch*, 21 Minn. 56; *Thatcher v. Kaucher*, 2 Colo. 698; *Clarion Bank v. Jones*, 21 Wall. 325; *Whelan v.*

to have a drover or a butcher to prove the value of a cow;<sup>1</sup> and an expert is not an indispensable witness.<sup>2</sup> If the article in question has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, utility and use. And opinions of witnesses properly informed on the subject may also be given in respect to its value.<sup>3</sup> In an action for the conversion of the bonds of a California corporation, which had never been put in market, and therefore had no market value, it was held that, though being payable in dollars, so that legally paper dollars would discharge them, yet it might be shown that in California they were treated as payable in coin and were practically payable in gold, with a view to their valuation by that standard.<sup>4</sup> In New Hampshire the rule appears to be to exclude opinions upon the subject of value.<sup>5</sup>

**§ 655. Rule in favor of vendor when delivery impossible.** The vendor may be relieved from the payment of dam- [379] ages by delivery being rendered impossible by the act of God. Thus, where a contract is made for the sale and delivery of specific articles of personal property under such circumstances that the title does not pass, if the property is destroyed by accident, without the fault of the vendor, he is not liable to

Lynch, 60 N. Y. 469; Covey v. Campbell, 52 Ind. 157; Chamness v. Chamness, 53 id. 301; Williams v. Brown, 28 Ohio St. 547; Lush v. Druse, 4 Wend. 313; Cliquot's Champagne, 3 Wall. 114; Lafayette, etc. R. Co. v. Winslow, 66 Ill. 219; Toledo, etc. R. Co. v. Kickler, 51 Ill. 157; White v. Hermann, id. 243; Eagle & P. Manuf. Co. v. Browne, 58 Ga. 240; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279; Holten v. Board, etc., 55 Ind. 194; Carpenter v. Robinson, 1 Holmes, 67; Barger v. Northern Pacific R. Co., 22 Minn. 343.

<sup>1</sup> Ohio & M. R. Co. v. Irvin, 27 Ill. 178.

<sup>2</sup> Ohio & M. R. Co. v. Taylor, 27 Ill. 207.

<sup>3</sup> Masterton v. Mayor, 7 Hill, 61; Murray v. Stanton, 99 Mass. 345;

Lafayette, etc. R. Co. v. Winslow, 66 Ill. 219; White v. Hermann, 51 Ill. 243; Kellogg v. Krauser, 14 S. & R. 137; Eaton v. Mellus, 7 Gray, 566; Berry v. Dwinel, 44 Me. 255; Wemple v. Stewart, 22 Barb. 154; Grand Tower Co. v. Phillips, 23 Wall. 471; Trout v. Kennedy, 47 Pa. St. 387; Saunders v. Clark, 106 Mass. 331; Jemison v. Gray, 29 Iowa, 537; Graham v. Maitland, 1 Sweeny, 149; Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co., 17 L. R. A. 33, 61 (Fla.), quoting the text. See Kirschmann v. Lediard, 61 Barb. 573.

<sup>4</sup> Simpkins v. Low, 54 N. Y. 183.

<sup>5</sup> Rochester v. Chester, 3 N. H. 349; Peterborough v. Jaffrey, 6 id. 462; Whipple v. Walpole, 10 id. 130; Hoitt v. Moulton, 21 id. 586.



the vendee in damages for non-delivery.<sup>1</sup> And it has been said in a comparatively recent case in England<sup>2</sup> that “where a contract has been made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.”<sup>3</sup> In the case from which this quotation is made, Blackburn, J., delivering the unanimous decision of the court, said: “The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance.”<sup>4</sup> This principle was applied where there was a contract to sell potatoes to be grown on defendant’s land in W., which was rendered impossible of full performance because a disease attacked them.<sup>5</sup> The vendor may likewise be excused, as may all contracting parties, when the act stipulated to be done has become unlawful,—as would be the case if, after making the agreement, a statute is passed rendering the performance illegal.<sup>6</sup>

**§ 656. Rule where purchase price paid.** If at the time of making an executory agreement for the sale of goods payment for them is made to the vendor, and he afterwards neg-

<sup>1</sup>Dexter v. Norton, 47 N. Y. 62; Davis v. Cary, 15 Q. B. 418. The Thomas v. Knowles, 128 Mass. 22; Gould v. Murch, 70 Me. 288.

<sup>2</sup>Taylor v. Caldwell, 3 B. & S. 826.

<sup>3</sup>Rugg v. Minett, 11 East, 210.

<sup>4</sup>Appleby v. Meyers, L. R. 1 C. P. 615; S. C., 2 id. 651; Robinson v. Davidson, L. R. 6 Exch. 269; Knight v. Bean, 22 Me. 531; Dickey v. Linscott, 20 id. 453.

<sup>5</sup>Howell v. Coupland, 1 Q. B. Div. 258.

<sup>6</sup>Benj. on Sales, § 571 and note; Bailey v. De Crispigney, L. R. 4 Q. B. 180; Baylies v. Fettyplace, 7 Mass. 325; Clancy v. Overman, 1 Dev. & Bat. 402; Jones v. Judd, 4 N. Y. 412;

learned author just cited says generally of defense of impossibility: “If the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking, unconditionally, to fulfill a promise, when he might have guarded himself by the terms of his contract.” Benj. on Sales, § 571 and note g. See, also, § 572; and Jones v. United States, 96 U. S. 24; Booth v. Spuyten Duyvil R. M., 60 N. Y. 487.

lects or refuses to complete the sale by delivery, the [380] amount paid with interest should be added to the damages which the vendee is otherwise entitled to recover. In other words, he is entitled to recover the market value of the goods at the time and place when and where they should have been delivered.<sup>1</sup> In some states the highest market price between the date of the breach and the commencement of the action or the trial is the measure of damages where the price has been paid, if there has been no unreasonable delay in commencing or prosecuting the suit.<sup>2</sup> This doctrine has been held in New York,<sup>3</sup> but the tendency of the later de- [381]

<sup>1</sup> *Bozeman v. Rose*, 40 Ala. 212; *Rose v. Bozeman*, 41 id. 678; *McGehee v. Posey*, 42 id. 330; *Moore v. Fleming*, 34 id. 49; *Neil v. Clay*, 48 id. 252; *Rutan v. Hinchman*, 29 N. J. L. 112; *Fenton v. Perkins*, 3 Mo. 23; *Farwell v. Kennett*, 7 Mo. 595; *Alexander v. Macauley*, 6 Md. 359; *Dyer v. Rich*, 1 Met. 180; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Leach v. Smith*, 25 Ark. 246; *Kirschmann v. Lediard*, 61 Barb. 573; *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180; *Underhill v. Goff*, 48 Ill. 198; *Butler v. Baker*, 5 Ohio St. 484; *Bicknell v. Waterman*, 5 R. I. 43; *Marshall v. Ferguson*, 23 Cal. 65; *Enders v. Board of Public Works*, 1 Gratt. 372; *Baltimore City P. Ry. Co. v. Sewell*, 35 Md. 238; *McDonald v. Hodge*, 5 Hayw. 86; *Doak v. Snapp*, 1 Cold. 180; *Hamilton v. Ganyard*, 34 Barb. 204; *Haywood v. Haywood*, 42 Me. 229; *West v. Pritchard*, 19 Conn. 212; *Whitsett v. Forehand*, 79 N. C. 230; *Kitzinger v. Sanborn*, 70 Ill. 146; *Kribbs v. Jones*, 44 Md. 396; *Parsons v. Sutton*, 66 N. Y. 92; *Sadler v. Bean*, 37 Iowa, 439; *Moorehead v. Hyde*, 38 id. 382; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 id. 484; *Furlong v. Polleys*, 30 id. 491; *Berry v. Dwinel*, 44 id. 255; *Bush v. Holmes*, 53 id. 417; *Rider v. Kelley*, 32 Vt. 268; *Hill v. Smith*, id. 433;

*Copper Co. v. Copper Mining Co.*, 33 id. 92; *Wyman v. American Powder Co.*, 8 Cush. 168; *Pinkerton v. Manchester, etc. R.*, 42 N. H. 424.

In *Dey v. Dox*, 9 Wend. 129, a vendor when sued on a contract of sale, by which he agreed to deliver property, and for which only a nominal sum was paid down, permitted the vendee to recover the value of the property because he did not set up the fact of non-payment; held, he was thereby precluded from bringing a subsequent action for the value of the goods. The legal measure of damages for non-delivery of goods sold, but not paid for, is the difference between the contract price and the market value at the time when they should have been delivered.

<sup>2</sup> *Gilman v. Andrews*, 66 Iowa, 116; *Harrison v. Charlton*, 37 id. 134; *Fisher v. Dow*, 72 Texas, 432; *Mastersson v. Goodlett*, 46 id. 402; *Randon v. Barton*, 4 id. 489; *Calvit v. McFadden*, 13 id. 324; *Brasher v. Davidson*, 31 id. 190; *Gregg v. Fitzhugh*, 36 id. 127; *Cartwright v. McCook*, 33 id. 612; *West v. Pritchard*, 19 Conn. 212; *Davenport v. Wells*, 3 Iowa, 242; *Cannon v. Folsom*, 2 id. 101; *Stapleton v. King*, 40 id. 278; *Kent v. Ginter*, 23 Ind. 1; *Maher v. Riley*, 17 Cal. 415.

<sup>3</sup> *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Commer-*

cisions is towards the standard of value at the time and place of the breach.<sup>1</sup> The latest cases establish the rule that the pledgee of stock who converts it in good faith by making an

cial Bank v. Kortright, 22 Wend. 348; Wilson v. Little, 2 N. Y. 443; Lobdell v. Stowell, 51 id. 70.

<sup>1</sup> Ormsby v. Vermont Copper M. Co., 56 N. Y. 623; Tyng v. Commercial Warehouse Co., 58 id. 308; Mechanics' & T. Bank v. Farmers' & M. Nat. Bank, 60 id. 40; Whelan v. Lynch, id. 469; Wintermute v. Cooke, 73 id. 107.

In *Baker v. Drake*, 53 N. Y. 211, the previous decisions in cases of conversion were reviewed, and the law held to be that there is not a fixed and unqualified rule giving the plaintiff, in all cases of conversion, the highest market price from the time of conversion to the trial; and that such a rule cannot be upheld on any sound principle of reason or justice. Referring to *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91, affirmed, 22 id. 248; *West v. Wentworth*, 3 Cow. 82, and *Clark v. Pinney*, 7 id. 596, *Rapallo, J.*, said: "These were actions for the non-delivery of merchandise in pursuance of a contract of sale, and the extreme rule was applied of allowing to the vendor, as damages, the highest value up to the time of trial. This rule was, however, strictly confined to cases where the purchase price had been paid in advance, it being conceded that in the ordinary case, where the price was to be paid on delivery, the only rule is the market value on the day appointed by the contract for their delivery. It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this state in respect to contracts for the sale and delivery of goods. The reason upon which it is founded is that, where the

purchaser has not paid for the goods, he may, on the refusal of his vendor to deliver, go into the market and buy goods of a similar quality, and that what it would cost him to do this is the just measure of his damages; but where he has paid the purchase-money it is unreasonable to require him to pay it a second time; and therefore all fluctuations in price should be at the risk of the vendor who refuses to deliver while retaining the purchase-money. The very reasoning upon which these decisions are founded demonstrates their inapplicability to a case like the present, where the purchase-money of the stocks [bought on a margin] has not been paid by the complaining party, and the only additional payment which he would be required to make for the purpose of replacing the stocks would be such as was occasioned by the rise in the market price."

The general reasoning in this opinion is against the rule of the highest price after conversion or delivery due on contract, though the facts of the case were considered as not requiring the court to go the length of an unqualified reversal of the rule which had been so generally followed in that state. But subsequent cases, which have just been cited, and others referred to in the next note, show that *Baker v. Drake* has been accepted and followed as a case which has accomplished that departure.

The facts of the case and the law involved are thus stated and commented on in the opinion: "All that appears upon the subject (of the terms of the contract) in the evidence is that the plaintiff, through his friend

unauthorized sale of it and refuses to replace it on demand is liable for its highest market price between the time the owner receives notice of his act and such reasonable time thereafter

Rogers, deposited various sums of money with the defendants, and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited, which they did. No agreement as to margin or as to carrying of the stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should, from time to time, require; and that they would purchase the stock and hold and carry the same subject to the plaintiff's direction as to the sale and disposition thereof as long as the plaintiff should desire, and would not sell or dispose of the same unless the plaintiff's margin should be exhausted or insufficient, and not then unless they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale and due opportunity to make good his margin. The answer denies only the agreement to give notice of the time and place of sale, admitting, by implication, that in other respects the agreement is correctly set forth. . . . It appears that the plaintiff had during the whole course of his transactions with the defendants advanced, in the aggregate, but \$4,240 towards the purchase of shares which at the time of the alleged wrongful sale, November 18, 1868, had cost the defendants upwards of \$66,300 over and above all the sums so advanced by the plaintiff. By the stock lists in evidence it appears that these shares

were then of the market value of less than \$67,000, and the surplus arising from the sale after paying the amount due the defendants amounted to only \$558, which sum represents the value at that time of the plaintiff's interest in the property sold.

"It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of the action, November 24, 1868, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action and before the trial the stock underwent an alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale of thirty shares at one hundred and seventy per cent. was proved. It afterwards declined, and on the day preceding the trial, October 20, 1879, the price was one hundred and forty-three, having for a month previous to the trial ranged between one hundred and thirty-seven and one hundred and forty-five. The jury in obedience to the rule laid down by the trial court found a verdict for plaintiff for \$18,000, being just the difference between one hundred and thirty-four, which was the average price at which the defendant sold, and one hundred and seventy, the highest price touched before the trial,—thirty-six per cent. on five hundred shares. More than two-thirds of this supposed damage arose after the bringing of the suit. This enormous amount of profit given under the name of damages could not have been arrived at except upon the unreasonable supposition, un-



as it may be necessary for him to use in replacing such stock by purchasing it in the market.<sup>1</sup> This rule applies as well where the pledgee is a broker and carries the stock on a margin for a customer as where the owner has paid in full for it and was holding it for an investment.<sup>2</sup> It will be at once perceived that these cases rest upon the principle that it is the

ported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

“In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct the defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in a further loss as in profit, to lay down as an inflexible rule of law as damages for its wrongful interruption the largest amount of profit which subsequent development disclosed might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded. . . . But the rule adopted in *Markham v. Jaudon* (41 N. Y. 235), passing far beyond the scope of reasonable

indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good, and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss; but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instance as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss.” The court reached the conclusion that the dissenting opinions of Grover and Woodruff, JJ., in the case referred to, embody the sounder law.

<sup>1</sup> *Wright v. Bank of Metropolis*, 110 N. Y. 237; *Gruman v. Smith*, 81 id. 25; *Colt v. Owens*, 90 id. 368; *S. C.*, 47 N. Y. Super. Ct. 430; *Barnes v. Brown*, 130 N. Y. 371, reversing *Barnes v. Seligman*, 55 Hun, 339.

<sup>2</sup> *Wright v. Bank of Metropolis*, 110 N. Y. 237.

legal duty of the person wronged to use reasonable means to lessen the damage which may result from the wrong. It is believed that the same principle applies to contracts for the sale of goods, and that the same result will be reached by the courts of New York if the question shall arise.

A payment is not made within the rule by the transfer of earnest money, at least where that is repaid before a tender is made of the balance.<sup>1</sup> In Texas interest is not recoverable from the time of the breach, but only from the date of the valuation.<sup>2</sup> It is held in Iowa, but why it is not easy to determine, that where property has been paid for the purchaser is not bound to go into the market to lessen the liability of the vendor.<sup>3</sup>

§ 657. **Contracts for delivery of stocks.** Bellows, J., [382] in a New Hampshire case, thus sums up the reasons for the prevailing rule: "The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and else- [383] where. It is true that in some cases the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered into [384] the common consumption of the country, in the shape of provisions, perishable or otherwise, to hold that the plaintiff might elect as the rule in all cases the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would in many cases be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same

<sup>1</sup> Worthen v. Wilmot, 30 Vt. 555.

<sup>3</sup> Mann v. Taylor, 78 Iowa, 355.

<sup>2</sup> Masterson v. Goodlett, 46 Texas, 402; Fisher v. Dow, 72 id. 432.

cause, by review, new trial or otherwise. Shall there be different measures of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are doubtless cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain.”<sup>1</sup>

<sup>1</sup> *Pinkerton v. Manchester, etc. R. R.*, 42 N. H. 424.

In *Mayne on Damages* (4th Eng. ed.), p. 174, this subject is thus treated: “In the cases above discussed, no payment had been made for the goods, and on this ground they were distinguished from actions for not replacing stock, because in that case the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. *Gainsford v. Carroll*, 2 B. & C. at p. 625. Accordingly, where there has been a loan of stock, and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such a rate as will indemnify the plaintiff. Therefore, where the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial. *Downes v. Back*, 1 Stark. 318; *Harrison v. Harrison*, 1 C. & P. 412; *Shepherd v. Johnson*, 2 East, 211; *Owen v. Routh*, 14 C. B. 327. And it is no answer to say that the defendant may be prejudiced by the plaintiff’s

delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. Per *Grose*, 2 East, 212. In one case where it had fallen, it was estimated at its price on the day it ought to have been replaced (*Sanders v. Kentish*, 8 T. R. 162); and in another case, where no day was named for its replacement, and it had fallen in value, at its price on the day when it was transferred to the borrower. *Forrest v. Elwes*, 4 Ves. 492. But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day (*McArthur v. Seaforth*, 2 Taunt. 257); because such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim damages for any profit which he might have made, had he possessed the stock, at all events, unless his wish to have it back for that express purpose was distinctly communicated to the defendant. Therefore, when

There are cases in this country which distinguish con- [355]  
tracts for the delivery or replacing of stocks from other con-  
tracts of sale, by allowing for breach of the former the highest  
value up to the time of trial, while the damages for the [356]

the defendant lent five per cent. stock which was to be replaced on a fixed day, and after that day the government gave the holders an option to be paid off at par, or to commute their stock for three per cents, the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take the new stock; held, that he was not entitled to recover the price of so much of three per cent. stock as he might have obtained in exchange for his five per cents. *McArthur v. Seaforth, supra.*

"In the case cited the profits claimed were both contingent in their nature, and collateral to the breach of contract. But where a bond was given to secure the replacement of stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus was afterwards declared upon the stock, it was held by Sir John Leach, M. R., that in equity, and perhaps even at law, the lender was entitled to be placed in the same situation as if the stock had remained in his name, and was therefore entitled to the replacement of the original stock, increased by the amount of the bonus, and to dividends in the meantime, as well upon the bonus as upon the original stock. *Vaughan v. Wood*, 1 Myl. & K. 403.

"The rules established in the case of a loan of stock were held to be equally applicable where the loan was of mining shares. *Owen v. Routh*, 14 C. B. 327. There appears to be great similarity between these cases and that of a contract for the purchase of goods, in which payment is made beforehand. The

plaintiff is equally kept out of his money, and, therefore, equally unable to protect himself by going into the market to buy that which the defendant has agreed to sell him. The defendant has equally the use of the plaintiff's property, and is therefore able to make all the profits by means of it which the plaintiff could have made. If the case is to be governed by exactly the same rules as that of stock, it will require no farther discussion. But upon this point there seems to be very little agreement. . . . The only two cases in England which touch upon the subject, specifically, do not tend to clear it up very much. . . . (*Dutch v. Warren*, 2 Burr. 1010; *Startup v. Cortazzi*, 2 Cr., M. & R. 165.) . . .

"Such is the unsettled state of the law upon the subject. Mr. Sedgwick is of the opinion that the period of breach is the true time, in all cases, for estimating the damages, unless it can be shown that the article was to be delivered for some specific object known to both parties at the time, and thus a loss within the contemplation of both parties has been sustained. *Sedgw. on Dam.* 310 (4th ed.). This doctrine cannot be maintained in England, if, as he also thinks, there is no valid reason for making any difference between stock and any other vendible commodity. It is quite settled that the price of stock may be taken at the time of trial. The cases may, however, be distinguished on the ground that stock may be supposed to be purchased rather as an investment than for resale, while goods are



breach of the others have been measured by the value at the time when the goods should have been delivered.<sup>1</sup> But there appears to be no sound reason for this distinction. The market price of stocks fluctuates; so does the market price of other kinds of personal property; both are liable to factitious changes; but all stocks do not, nor do all other kinds of property, in fact, fluctuate to the same extent, or from the same immediate causes. The same considerations which commend [387] the rule of the value at the time of the breach in the case of a contract for the sale and delivery of merchandise apply with equal force to contracts for the sale and delivery of stocks. And it is believed the weight of American authority is in favor of assessing the damages for breach of contracts of sale by the same rule, whether they relate to stocks or merchandise, and whether the price has been paid or not.<sup>2</sup> In Pennsylvania the rule allowing the highest intermediate market price in stock transactions has been restricted to cases in which a trust relation exists between the parties.<sup>3</sup> In New

bought expressly to sell again. Consequently it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated, in regard to stock, at the price it bore at the time of trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz.: the time they ought to have been delivered."

The courts of England, in actions for non-delivery of railway shares, have given the value at the date of the breach, and not of the trial, and such cases are distinguished from those for failing to replace borrowed stock. *Shaw v. Holland*, 15 M. & W. 116; *Tempest v. Kilner*, 2 Q. B. 300; *Barned v. Hamilton*, 2 Eng. Railw. Cas. 624. And in *Elliott v. Hughes*, 3 F. & F. 387, the measure of dam-

ages for non-delivery of goods was determined by the highest price up to the trial.

<sup>1</sup> *Wells v. Abernethy*, 5 Conn. 222; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Kent v. Ginter*, 23 Ind. 1; *McKenney v. Haines*, 63 Me. 74; *Musgrave v. Beckendorff*, 53 Pa. St. 310.

<sup>2</sup> *Enders v. Board of Public Works, etc.*, 1 Gratt. 372; *Baltimore City P. Ry. Co. v. Sewell*, 35 Md. 238; *White v. Salisbury*, 33 Mo. 150; *Alexander v. Macauley*, 6 Md. 359; *Eastern R. Co. v. Benedict*, 10 Gray, 212; *Noonan v. Ilsley*, 17 Wis. 314; *Doak v. Snapp*, 1 Cold. 180; *Smith v. Dunlap*, 12 Ill. 184, 193; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Smithurst v. Woolston*, 5 W. & S. 106; *Coldren v. Miller*, 1 Blackf. 296; *Van Vleit v. Adair*, id. 346; *Columbia v. Amos*, 5 Ind. 184. See *Redding v. Godwin*, 44 Minn. 355.

<sup>3</sup> *Huntingdon, etc. R. & C. Co. v. English*, 96 Pa. St. 247.

York, after great discussion, the court of appeals has settled the law to be that the vendor or pledgee of stock is liable for the highest market price between the time of the sale or conversion and such reasonable time as the vendee or owner can, after knowledge of the other's act, supply himself with stock by going into the market.<sup>1</sup> This rule as applied to stock transactions between a broker and his principal is approved by the federal supreme court.<sup>2</sup>

In a Virginia case stock was borrowed to be returned at specified times; dividends to be paid in lieu of interest. It was not returned, but the borrower continued to pay the dividends for some time after the date for returning the stock. It was held the general rule of damages against a vendor was the value of the property at the time it should have been delivered, and interest from that date until paid; that there is no distinction in this respect between contracts for the sale and delivery of stocks and other executory contracts of sale; that under the circumstances the lender might recover the value of the stocks at the time the borrower ceased to pay dividends, with interest from that date.<sup>3</sup>

In an action at law against a corporation for refusing to issue or transfer stock the rule of damages is the same as upon a sale; the plaintiff may claim in the same suit the value of the stock and the dividends thereon, and the measure of damages is its value at the time of the demand, together with the dividends accrued thereon at that time with interest.<sup>4</sup>

**§ 658. Sale of good-will.** The property known as good-will is intangible and consists in "the advantage or benefit which is acquired by an establishment beyond the mere value

<sup>1</sup> See last section. In *Barnes v. Brown*, 130 N. Y. 371, there was a breach of a contract to assign full-paid stock of a certain corporation; stock not full paid was accepted and returned. The stock stipulated for had no actual or market value at the time the pretended delivery of it was made. It was held (reversing *Barnes v. Seligman*, 55 Hun, 339), that plaintiff was only entitled to nominal

damages, although the defendant, in order to perform the contract, would have been obliged to pay par for the stock. Plaintiff's recovery could not exceed the sum which would indemnify him for his loss.

<sup>2</sup> *Galigher v. Jones*, 129 U. S. 193.

<sup>3</sup> *Enders v. Board of Public Works*, 1 Gratt. 372.

<sup>4</sup> *Baltimore City P. Ry. Co. v. Sewell*, 35 Md. 238.

of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.”<sup>1</sup> Owing to the peculiarity of the property, the degree of certainty as to the proof of damages which result from the breach of contracts for the sale of it is not as attainable as in the breach of contracts for the sale of tangible property. This uncertainty is not to work a denial of justice to a party who has been wronged; the damages must be ascertained from all the facts and circumstances as best they may. They are to be measured by the injury done, not by ineffectual attempts to injure.<sup>2</sup> The standard is the same whether relief is sought in an independent action or by counter-claim.<sup>3</sup> Where the plaintiff purchased, not merely the good-will attached to the premises transferred, but the property and good-will of the business and the exclusive right to use a trade-mark, it was held that proof of the damages resulting from a breach need not be made by showing specific loss of business and profits as of a bill of particulars of his injuries.<sup>4</sup> In such a case the wrong done by the vendor is a wilful one, and the case is such as he has chosen to make it; hence his is the loss which may arise from the uncertainty pertaining to the nature of it and the difficulty of accurately estimating the results of his own wrongful act.<sup>5</sup> The good-will of a business which consists of labels and wrappers bearing the name of the vendor, or other marks or brands, will be protected on principles analogous to those which govern the infringement of trade-marks; the plaintiff who has obtained the exclusive right to manufacture and sell articles so wrapped may recover all the profits made by defendant therefrom regardless of the effect upon his own business or profits.<sup>6</sup> On

<sup>1</sup> Story's Part., § 99. See *Barber v. Connecticut, etc. Ins. Co.*, 15 Fed. Rep. 312; *Wedderburn v. Wedderburn*, 22 Beav. 84.

<sup>2</sup> *Burckhardt v. Burckhardt*, 36 Ohio St. 261.

<sup>3</sup> *Id.*

<sup>4</sup> S. C., 42 Ohio St. 474, 497.

<sup>5</sup> *Id.*; *Mellersh v. Keen*, 28 Beav. 453.

<sup>6</sup> *Peltz v. Eichele*, 62 Mo. 171.

the breach of a contract not to resume the practice of a profession the damages are measured by the value of the practice lost by the plaintiff, less the sum due under the contract of purchase to the defendant.<sup>1</sup> The damage sustained, not the consideration paid, measures the recovery.<sup>2</sup>

In an Indiana case it was claimed that fraudulent representations were made to the purchasers of a stock of merchandise and the good-will of the business, in this, that the annual sales were represented to be \$30,000, while they were in fact but one-half of that sum. The purchasers obtained a lease of the building in which the vendor had carried on business. The following is substantially the instruction given by the trial court on the question of damages, of which the supreme court said that it is as accurate, correct and fair a statement of the proper measure thereof as could well be given: The subject of good-will can be considered and its value determined only in connection with the leasehold or rental value of the building or rooms wherein the business was done; the question is confined to the difference between the rental value of the building if the business done there had amounted to the sums represented and the amount of business in fact done there by the vendor. "By the increased rental value on account of the good-will attached is meant, not how much more money would the occupant of the building have made if the good-will had been as represented; that could never be certainly determined; but how much was the rental value increased, or would it have been increased, if attended by such good-will; how much more rent for that place of business would men generally pay for the purpose of carrying on there the same business for the sake of getting such good-will. In short, what is the good-will worth, fixing the value beforehand, taking the chance of realizing on it."<sup>3</sup>

**§ 659. Contracts to pay in or deliver specific articles.** Where the vendee has paid or furnished the consideration, whether directly as purchase-money or in an antecedent debt, and the vendor, for that consideration, undertakes to deliver

<sup>1</sup> Warfield v. Booth, 33 Md. 63. See Howard v. Taylor, 90 Ala. 241.

<sup>2</sup> Stewart v. Challacombe, 11 Ill. App. 379.

<sup>3</sup> Rawson v. Pratt, 91 Ind. 9; Montgomery, etc. Society v. Harwood, 126 id. 440. See Musselman's Appeal, 63 Pa. St. 81.



a specific quantity of goods of a given description at a future [388] day, the contract is of the very nature of those considered, and the damages are calculated upon the value of the property in case of failure to deliver it.<sup>1</sup> The word "dollars" is sometimes used in such contracts not to express the value in legal currency to be paid but the quantity of the specific thing to be delivered. It is then a measure of quantity. Thus, on the breach of an agreement to pay a given sum in a particular species of paper, as bank or other notes, or stock, recovery can be had only of the value of such paper.<sup>2</sup> Where one party gave another an acknowledgment of indebtedness, thus: "Due N. \$300 in W. R. R. stock," it was held to bind the party giving it to pay so many dollars in the stock of the company as, when counted at par, would amount to \$300. The court say: "If the stock is appreciated above par, the payee is to be benefited by the increased value; and if depreciated he is then [389] to be restricted to \$300, although worth less than that

<sup>1</sup> *Montelius v. Atherton*, 6 Colo. 224; *Danforth*, 6 N. Y. 585; *Newman v. Cummings v. Dudley*, 60 Cal. 383; *McGregor*, 5 Ohio, 349; *Starr v. Light*, 22 Wis. 414; *Jemmison v. Gray*, 29 Iowa, 537.

<sup>2</sup> *Hixon v. Hixon*, 7 Humph. 33; *Robinson v. Noble*, 8 Pet. 181; *Hopson v. Fountain*, 5 Humph. 140; *Bush v. Hibbard*, 24 Barb. 292; *Gordon v. Parker*, 2 Sm. & M. 485; *Walker v. Meek*, 12 id. 495; *Arnold v. Suffolk Bank*, 27 Barb. 424; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Eastern R. Co. v. Benedict*, 10 Gray, 212; *Child v. Pierce*, 37 Mich. 155; *Coldren v. Miller*, 1 Blackf. 296; *Van Vleet v. Adair*, id. 346; *Cotton v. Reed*, *Sneed (Ky.)*, 24; *Fosdick v. Greene*, 27 Ohio St. 484; *Green v. Sizer*, 40 Miss. 530; *Kirtland v. Molton*, 41 Ala. 548; *Williams v. Jones*, 12 Ind. 561; *Anderson v. Ewing*, 3 Litt. 245; *Pierce v. Spader*, 13 Ind. 458; *Memphis, etc. R. Co. v. Walker*, 2 Head, 467; *Williams v. Sims*, 22 Ala. 512; *Hart v. Lanman*, 29 Barb. 410; *Marr v. Prother*, 3 Met. (Ky.) 196; *Clay v. Huston*, 1 Bibb, 461; *Doak v. Snapp*, 1 Cold. 467.

*Barnes v. Brown*, 130 N. Y. 371, stated in note to section 657; *Butler v. Baker*, 5 Ohio St. 484; *Dyer v. Rich*, 1 Met. 180; *Neel v. Clay*, 48 Ala. 252; *Leach v. Smith*, 25 Ark. 246; *Doak v. Snapp*, 1 Cold. 180; *McGehee v. Posey*, 42 Ala. 330; *Brasher v. Davidson*, 31 Tex. 190; *Cartwright v. McCook*, 33 id. 612; *Edgar v. Boise*, 11 S. & R. 445; *Safely v. Gilmore*, 21 Iowa, 588; *Hixon v. Hixon*, 7 Humph. 33; *Williams v. Jones*, 12 Ind. 561; *Pierce v. Spader*, 13 id. 458; *Williams v. Sims*, 22 Ala. 512; *Moore v. Fleming*, 34 id. 491; *Marr v. Prather*, 3 Met. (Ky.) 196; *Herbert v. Easton*, 43 Ala. 547; *Powe v. Powe*, 42 Ala. 113; *Mettler v. Moore*, 1 Blackf. 342; *Hedges v. Gray*, id. 216; *Clay v. Huston*, 1 Bibb, 461; *West v. Wentworth*, 3 Cow. 82; *Barrett v. Allen*, 10 Ohio, 426; *Smith v. Berry*, 18 Me. 122; *Vance v. Bloomer*, 20 Wend. 196; *Rockwell v. Rockwell*, 4 Hill, 164; *Baker v. Mair*, 12 Mass. 121; *Brooks v. Hubbard*, 3 Conn. 58; *Gilbert v.*

sum in money. The authorities abundantly show that where the instrument, like the one at bar, is to be paid in bank notes, or in stock or scrip in the similitude of bank notes, then the market value of the notes, stock or scrip is the measure of damages. And the reason given for the rule is, that where a party engages to pay so many dollars in bank notes, stock or scrip, the articles are described and numerically calculated by the number they express; so that \$300 in railroad stock or bank notes is understood to mean that amount as expressed upon the face of the stock or note, and not the amount which will be equivalent in value to \$300 in money; while an instrument drawn for the payment of so many dollars in chattels — wheat, salt, cloth, wool or other like articles — is construed to mean so much of those things as will amount to the sum in money, because the things themselves cannot be counted by dollars, as the name is never applied to them.”<sup>1</sup>

It has been already stated that if the property to be delivered has no market value its real value is to be ascertained by such elements of value as are attainable.<sup>2</sup> Of this character are promissory notes; stocks of projected corporations which fail to organize or any stocks in which there has been no traffic. Where such subjects are contracted to be sold, and there is no market value, how may value be established? Where, for instance, a contract is made for the transfer of a third person's note of a certain amount in exchange for property, upon breach it has been held that the measure of damages is what the note purports to be worth.<sup>3</sup> But in [390]

<sup>1</sup> Noonan v. Hsley, 17 Wis. 314; Anderson v. Ewing, 3 Litt. 245; German Union, etc. Ass'n v. Sendmeyer, 50 Pa. St. 67; Dillard v. Evans, 4 Ark. 175; Phelps v. Riley, 3 Conn. 266; Robinson v. Noble, 8 Pet. 181; Parks v. Marshall, 10 Ind. 20; Orange & A. R. Co. v. Fulvey, 17 Gratt. 366; Mettler v. Moore, 1 Blackf. 312; Wyman v. American Powder Co., 8 Cush. 168; Hedges v. Gray, 1 Blackf. 216; Humaston v. Telegraph Co., 20 Wall. 20; Hussey v. Manufacturers' & M. Bank, 10 Pick. 415; Thrasher v. Pike County R. Co., 25 Ill. 393; Rutan v. Hinchman, 29 N. J. L. 11; Sargent v. Franklin Ins. Co., 8 Pick. 90; Eastern R. Co. v. Benedict, 10 Gray, 212; Smith v. Dunlap, 12 Ill. 184; Sirlott v. Tandy, 3 Dana, 142; Breckinridge v. Rolls, 2 T. B. Mon. 150; January v. Henry, 3 id. 8; White v. Green, id. 155; Alexander v. Macauley, 6 Md. 359. See Thorington v. Smith, 8 Wall. 1; Shelton v. French, 33 Conn. 489.

<sup>2</sup> *Ante*, §§ 653, 654.

<sup>3</sup> Fenton v. Perkins, 3 Mo. 23; Shelton v. French, 33 Conn. 489; Farwell v. Kennett, 7 Mo. 595; Child v.

Alabama it is held that such an undertaking is not one to pay the face of the notes;<sup>1</sup> that the *onus* of proving the value is on the plaintiff; and that, in the absence of affirmative proof of value, only nominal damages can be given.<sup>2</sup> It is believed that the weight of authority is in favor of the rule that notes are *prima facie* worth their face; and that, in the absence of disparaging evidence, damages may be assessed on that basis, both in actions for failure to transfer and for conversion.<sup>3</sup> Where the contract is to pay in the notes of a third person the insolvency of such person may be shown to lessen the damages.<sup>4</sup>

§ 660. **Same subject.** Stocks, like promissory notes, have a nominal value expressed in dollars or pounds sterling; and, as we have seen, on a breach of a contract for the delivery or

Pierce, 37 Mich. 155; Bates v. Cherry Valley R. Co., 3 Thomp. & C. 16; Thomas v. Dickinson, 12 N. Y. 364; S. C., 23 Barb. 431; Kirschmann v. Lediard, 61 Barb. 573.

<sup>1</sup> Williams v. Sims, 22 Ala. 512; Jolly v. Walker, 26 id. 690; Wilson v. Jones, 8 id. 536; Carter v. Penn, 4 id. 140; Moore v. Fleming, 34 id. 491.

<sup>2</sup> Id. See, also, McKiel v. Porter, 4 Ark. 534; Elliott v. Chilton, 5 id. 181.

<sup>3</sup> Neff v. Clute, 12 Barb. 466; Baker v. Jordan, 5 Humph. 485; Pledger v. Wade, 1 Bay, 35; Sturges v. Keith, 57 Ill. 451; Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 id. 484; Eastern R. Co. v. Benedict, 10 Gray, 212; Arnold v. Suffolk Bank, 26 Barb. 424; Thomas v. Dickinson, 23 id. 431; S. C., 12 N. Y. 364; Child v. Pierce, 37 Mich. 155; Clay v. Huston, 1 Bibb, 461; Parks v. Marshall, 10 Ind. 20; Smith v. Dunlap, 12 Ill. 184; Rutan v. Hinchman, 29 N. J. L. 112.

In Bicknall v. Waterman, 5 R. I. 43, there was an agreement for the exchange of a specified lot of cotton for a specified note of a third person at an agreed price for the cotton. The agreement was made through a broker acting for the parties, and, it

being agreed that the purchaser's note should be given for the difference, nothing remained to be done but to deliver the cotton and receive the notes. It was held to be no defense to an action upon the contract for not delivering the cotton upon tender of the notes, that before the contract was entered into the maker of the first named note had failed, both parties and the broker being at the time of the contract ignorant of the failure; the law implying, in such a contract of exchange, no warranty of the solvency of the maker. The rule of damages in such a case was held to be the value of the note in money at the time of the contract, at the stipulated price of the cotton to be received in exchange, with interest upon the value from the day the cotton was demanded; the note which had been deposited in the registry of the court to be at the disposal of the defendant.

<sup>4</sup> Derleth v. Degraaf, 51 N. Y. Super. Ct. 369; Potter v. Merchants' Bank, 28 N. Y. 655; Thayer v. Manley, 73 id. 307; Hynes v. Patterson, 95 id. 6.

transfer thereof recovery is based on their market value, if they have such. In the absence of that evidence of value, [391] other circumstances must be resorted to; and their nominal value will perhaps be accepted where there is no other proof. In one case the plaintiff agreed to sell a certain patent to the defendants, who, it was recited in the agreement, were about to organize a company for the manufacture of the articles under the patent; the plaintiff agreed to make such conveyance as should be necessary to carry the agreement into effect immediately upon the organization of the company; and in consideration thereof the defendants agreed to transfer to the plaintiff, among other things, an amount equal to \$50,000 of the capital stock of the corporation. The court held that the plaintiff was entitled to damages for the breach of this contract; that the amount depended on the value of the stock after the corporation was formed, to be proven by showing what such value would have been if the company had been formed, taking into consideration the property that was to be transferred, and also that by the breach the plaintiff was released from the obligation to transfer it. In such a case it was held to be erroneous to give the plaintiff damages to the nominal amount of the stock. Referring to a previous case.<sup>1</sup> Ingraham, J., said: "In that case the rule of damages was said to be the amount of the obligation to be delivered in payment. But there the plaintiff had transferred to the defendant the property he had agreed to sell, and the court held that the plaintiff could recover the price at which the same was agreed to be sold. Here there has been no conveyance of the property, but the same is retained by the plaintiff, and he is only entitled to damages, and not to the nominal value agreed to be paid. The rule of damages is to be fixed by proof of what the value of the stock would have been if the contract had been performed, over and above the property retained by the plaintiff. Had the property been transferred by the plaintiff, then, in the absence of any proof of value, the rule adopted on the trial would have been the correct one." The trial court had directed a verdict for the nominal amount of the stock.<sup>2</sup> Contracts are not unfrequently made upon [392]

<sup>1</sup> Thomas v. Dickinson, 23 Barb. 431; reversed, 12 N. Y. 364.

<sup>2</sup> Kirschmann v. Lediard, 61 Barb. 573; Bates v. Cherry Valley, etc. R.



executed considerations to pay a stated sum in specific articles. Upon failure to deliver the articles at the time they are due, the contract furnishes, in the designated sum, the measure of damages. It is the sum stated and agreed to be paid, with interest.<sup>1</sup>

Where the agreement is to pay a certain specified sum in specific articles at a stated price, there is much conflict as to the criterion of damages. Thus, a contract to pay \$250 at a future day, in brown cotton shirting at thirty cents per yard, was held to be an agreement to pay \$250, with an option to the maker to pay at maturity in brown shirting at the stipulated price per yard. The court say that the promise to pay \$250 necessarily implies a recognition of indebtedness to that amount; that the residue of the note has no bearing on this point, and relates exclusively to the mode of payment; that the manner in which the debt is to be paid, whether in cash or in collateral articles, has no relevancy in ascertaining the sum due; it points to an object wholly separate and distinct. This is an early and leading case upon the rule of damages which it

Co., 3 Thomp. & C. 16; affirmed, 59 N. Y. 641.

In *Dyer v. Rich*, 1 Met. 180, it was held that a promise that one shall receive a certificate of ten shares of the corporate stock of a certain manufacturing company whose capital stock shall be \$100,000, divided into no more than two hundred shares, is not fulfilled by a tender of a certificate of ten shares of stock in that company of which only \$35,000 are paid in, divided into seventy shares. And it was also held that the rule of damages for breach of such promise is the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready in good faith to operate upon such capital according to the charter.

<sup>1</sup> *Haywood v. Haywood*, 42 Me. 229; *Alexander v. Macauley*, 6 Md. 359; *Marshall v. Ferguson*, 23 Cal. 65; *Burr v. Brown*, 5 W. Va. 241.

See *Currie v. White*, 6 Abb. (N. S.) 352; *Moore v. Hudson R. Co.*, 12 Barb. 156.

In *Jones v. Foster*, 67 Wis. 296, the purchaser of mill machinery was to pay a certain price with interest, by sawing logs which the vendor was to furnish, in yearly instalments until all the timber on certain lands was cut; this might be done in two years, and was required to be done in four. After the expiration of four years the purchaser brought an action based on the failure to furnish logs. It appeared that if the agreement had been complied with the machinery would probably have been paid for by the sawing which would have been done in two years. The plaintiff recovered as damages a sum equal to the profits he would have made if the logs had been supplied, less the price of the machinery and two years' interest thereon.

lays down. Hosmer, C. J., delivering the unanimous opinion of the court, further expounded the contract by saying: "If the defendant, when the note was given, did not owe the plaintiff \$250, and this sum is to be considered as a penalty to enforce the contract, what is the value of the stipulation? It is a promise to pay *blank* yards of cotton shirting, and void for uncertainty. Expunge the \$250, or what is virtually the same thing, decide that it is not the real amount of debt, or liquidated damages, and the note contains no criterion by which the number of yards of shirting can be estimated. Now, [393] as the quantity of shirting is not mentioned, it necessarily follows that unless the \$250 is the sum due to the plaintiff, and therefore a standard by which to establish the value of the contract, there is no certain engagement in words, or by reference, from which the debt can be ascertained. It is admitted by the defendant that if the note had been for \$250, payable in cotton shirting, and there had ceased, that the damages, in the event of non-payment, must be the sum expressed. This surrenders the question in controversy. Why should the above sum be payable in the event expressed? For this convincing reason: because the damages are *liquidated*. But if the damages had been liquidated, the subsequent agreement that the shirting should be received at thirty cents per yard can have no possible effect on the prior liquidation. It was not inserted for that purpose, but to obviate the necessity of recurring to parol proof for the ascertainment of the value of the shirting should it be delivered. For this end the parties agreed on a certain arbitrary valuation, which they anticipated would probably be the real value, but which, in all events, they, for their mutual convenience, agreed to consider as such. This is the whole scope and effect of this latter clause in the note: that the defendant might know how many yards of shirting to deliver, and the plaintiff how much he was entitled to demand, if it should be tendered. The case has been argued for the defendant as if there had been a promise to deliver a certain number of yards of shirting, and an omission to deliver them. That would present a question of unliquidated damages, in which resort must be had to parol testimony to ascertain the value of the contract, but it has no imaginable bearing on the case before the court in which the debt is ascertained. It has been contended that in no case can

the plaintiff recover a sum greater in amount than the value of the article, which, had it been tendered, would have satisfied the contract. This principle is manifestly incorrect; and is not always true, even when applied to a case where the damages have not been liquidated. In a contract for the transfer of stock on a certain day, the party promising may be relieved by a strict performance of his engagement; but, if he omit to do it, the court will award in damages against him the price of the [394] stock, although it has risen at the moment when the judgment is rendered. The construction which I have given to the note in question is according to the obvious intention of the parties, and perfectly equitable in its result. The sum expressed is to ascertain the indebtedness, that is \$250; and the residue to give an option to the defendant to pay the debt in collateral articles at a stipulated price. If the payment were not made, what must be the expected consequence? That this part of the agreement should be as if it had never existed; and then the whole contract should be comprised in the expression, 'I promise to pay \$250.' Nothing can be more conformable to natural justice. The plaintiff will receive the precise sum admitted to be his due, and no more. And if the defendant is in a condition less eligible than he would have been if he had availed himself of the option allowed him it was his voluntary choice. After he had renounced the privilege accorded to him, to limit the recovery of the plaintiff by the value of the cotton shirting, would be to give the defendant the abnegated option in another shape, in defiance of equity, and in opposition to the agreement of the parties."<sup>1</sup>

§ 661. **Same subject; author's opinion.** This view of the law was adopted afterwards in New York. There were earlier decisions there to the same effect, but they received less consideration. The clause of the contract providing for payment in specific articles and fixing the value was deemed to be inserted for the benefit of the debtor; it offers him a mode of payment which he can adopt or not at his pleasure. The contract thus construed is an alternative one, authorizing the debtor to pay the sum stated therein in specific articles when due, or in money. The chancellor remarked in the course of

<sup>1</sup> Brooks v. Hubbard, 3 Conn. 58.

his opinion that "the language is certainly not the best which could be used to express such an intent, and probably if the contract was drawn by a lawyer he would put it in the alternative, giving the debtor the option in express terms to pay the debt in money or in wheat at the fixed rate per bushel. But certainly if the intention of the parties was that a certain number of bushels of wheat should be abso- [395] lutely delivered in payment, a lawyer would draw the note for so many bushels of wheat in direct terms."<sup>1</sup> In some other states such a contract is construed as an agreement for the delivery of the specific articles, and in case of breach by non-delivery the rule of damages is the value of the articles and not the sum stated therein.<sup>2</sup> Uninfluenced by any traditional use or extraneous practical construction of such contracts in states or localities where they are common, giving them, or tending to give them, by custom, a special meaning which the language does not suggest, they appear to the writer to be contracts, not simply to pay the sum mentioned, but mutually binding to make and receive payment as the instrument specifies, and that upon default of the debtor the general principle in respect to the *quantum* of damages which applies generally will govern; that is, that the creditor shall receive such sum in damages as will place him in as good condition as though the goods or property had been paid according to the contract. The divergence of the decisions is wholly attributable to the singularity of holding the promise to pay in property at a specified price as not absolutely obligatory; that it imposes no absolute obligation on the debtor, nor confers any right on the creditor. A valid promise, for instance, to pay \$250 in shirting at thirty cents a yard is obviously an absolute promise, in terms, to pay eight hundred and thirty-three and one-third yards; read as the law construes contracts generally there is no room for interpretation. The creditor is

<sup>1</sup> Pinney v. Gleason, 5 Wend. 393; McDonald v. Hodge, 5 Hayw. 86; West v. Wentworth, 3 Cow. 82; Gregg v. Fitzhugh, 36 Tex. 127; Smith v. Smith, 2 Johns. 243. See Price v. Justrobe, Harp. 111; Wilson v. George, 10 N. H. 445; Mattox v. Trowbridge v. Holcomb, 4 Ohio St. 38. Craig, 2 Bibb, 584; Cole v. Ross, 9 B. Mon. 393; Starr v. Light, 22 Wis. 414;

<sup>2</sup> Meason v. Phillips, Add. (Pa.) Pierson v. Spaulding, 61 Mich. 90. 346; Edgar v. Boise, 11 S. & R. 445;



not only entitled to be paid \$250, but he is entitled to receive it in shirting at that price, and the debtor binds himself to make payment accordingly. If there is a want of directness in the agreement, and it would be more natural to express the intention and legal effect by a direct promise of the number of yards, it may be answered that it is not a legitimate deduction from this slight circuitry that the parties do not [396] mean what they say; it is more objectionable to infer that they mean something which they have not said, either directly or by any circumlocution. The interpretation which allows the promisor an option to pay the \$250 in money in satisfaction of his promise ignores a part of the contract and treats it as expunged. The promise as made is not an absolute promise to pay \$250, either in money or in value. If the shirting should be worth just thirty cents a yard when the pay-day comes the nominal would be the real value, not otherwise. If the shirting should be worth more than thirty cents per yard when due, the promise to the extent of that excess would be for more than \$250. Hence by making this contract there is no precise liquidation of indebtedness. Nor is there any implication from the contract that the indebtedness ever existed in any other form. If it in fact did previously exist as an absolute debt for that amount, the action for breach of this contract would not be affected by that circumstance. Doubtless, after a default an action might be sustained on the indebtedness in its prior form, as though the promise to pay it in specific articles had never been made; because the making of the contract in such case, without performance, would not satisfy the debt; receiving it would be only a conditional payment, and after default no payment at all.

In a case in Ohio where a contract was entered into for work at a certain price, with a stipulation that the same was to be paid for in specific articles at an agreed rate and price, the debtor was held to have an election to deliver the articles or pay the money if such right is expressed or fairly to be implied. If not expressed and the subject-matter, or *res gestæ*, indicates that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and im-

perative promise to deliver the specific articles. If the right of election to pay money or the articles at the option of the debtor exists, and the latter are not delivered, the plaintiff should recover the amount of the debt and interest; but if no such election is expressed or implied the plaintiff is entitled to the market value of the articles with interest.<sup>1</sup>

**§ 662. Consequential damages on contracts of sale. [397]**

The damages which a purchaser is generally entitled to for failure of the vendor to deliver the property contracted are measured by the rules which have been discussed in the preceding pages.<sup>2</sup> Under special circumstances known to the parties at the time of contracting, the damages may be enhanced beyond the real or market value of the property. This is the case when the sale is made for some special use of it by the purchaser, and where, in consequence of the non-delivery, he, in respect to that intended use, sustains damages beyond its value, or the difference between the contract and market price of the property. If a person contracts with another for the sale of personal property and breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made it as the probable result of its breach.<sup>3</sup> It is but the general rule of damages for breach of contract applied to contracts of sale. If the contract be simply one for merchandise at a certain price, to be delivered at a designated time and place, the rule of the difference between the contract and market price and interest affords full compensation; for the vendee may go into the market and purchase like goods at the current price, and thus save himself from loss. Where, however, particular goods, or

<sup>1</sup> *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180.

*Griffin v. Colver*, 16 N. Y. 489; *Smeed v. Foord*, 1 Ellis & E. 602.

In *Harrington v. Wells*, 12 Vt. 505, it was held that if one agrees to pay a certain sum in specific articles, worth much less than the agreed price, but fails to fulfill, he is liable for the sum stipulated.

<sup>2</sup> See, also, vol. 1, § 45.

<sup>3</sup> *Hadley v. Baxendale*, 9 Exch. 341;

The holder of an insurance policy upon a house he has sold is not liable because of his failure to assign it as agreed for the loss resulting from the destruction of the house. The cost of insuring it for the remainder of the term measures his responsibility. *Dodd v. Jones*, 137 Mass. 322.

those of a designated description, are bargained for for a special purpose, or for delivery at a particular time and place in view of ulterior contracts or preparations, a failure of the vendor to perform may cause injury which would not be compensated by that rule; but unless, according to the great preponderance of authority, that purpose, or the special circumstances from which, in case of default, such consequential damages would proceed, were communicated to the seller when the bargain was made, such damages, though they may arise naturally and proximately from the breach of the contract, are yet exceptional, and cannot be said to have entered [398] into the contemplation of the parties.<sup>1</sup> A view somewhat at variance with that stated and the current of authority has recently been held in Virginia by a majority of the judges of the court of last resort. There was no market at or near the place appointed for the delivery of the property, which was paid for in advance, and which the vendor did not deliver. Subsequent to the making of the contract a resale of the property was made at an advance over the purchase price. The price upon the resale was held to afford the best and very satisfactory evidence of its value. Referring to the distinction stated between a resale made at an advance subsequent to a contract of purchase and one made before that event and of which the vendor is informed, the court observe: "This is a rather fanciful distinction. It is not in accordance with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber-getter selling seven hundred thousand feet of lumber to a dealer in lumber should know (1) that it was for a resale; (2) that this resale was to be on a profit; and (3)

<sup>1</sup> Buffalo Barb Wire Co. v. Phillips, 420; Parks v. O'Connor, 70 Texas, 64 Wis. 338; Goodkind v. Rogan, 8 377; Cuddy v. Major, 12 Mich. 368; Ill. App. 413 (cost of reshipment of Young v. Cureton, 87 Ala. 727; Mann v. Taylor, 78 Iowa, 355; Rahm v. Deig, 121 Ind. 283; Citizens' N. Gas Co. v. Shenango N. Gas Co., 138 Pa. goods not according to warranty not recoverable); Jones v. National Printing Co., 13 Daly (N. Y.), 192; Liljengren Furniture Co. v. Mead, 42 Minn. St. 22.

that he should know that his vendee would be damaged to the amount of his profit if the vendor should prove faithless.”<sup>1</sup> But according to the accepted rule, if, at the time of contracting, sufficient notice be given of the intended use or of other and dependent plans, the vendor on failure to deliver, or delaying delivery, will be subject to proximately consequential damages. Thus, if the buyer has, in advance, made a contract for resale and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable to damages on the basis of the profits the vendee would realize upon his contract for such resale.<sup>2</sup> Those profits may justly be said to have entered into the contemplation of the parties in making the contract. This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of contract he shall, so far as money can do it, be placed in as good a situation, by recovery of damages, as if the contract had been performed.<sup>3</sup> Expenses incurred in making sales in anticipation of delivery may be recovered as well as the profits which would have been made.<sup>4</sup>

<sup>1</sup> *Trigg v. Clay*, 13 S. E. Rep. 434; — Va. —. See *Sterling Organ Co. v. House*, 25 W. Va. 64, 90, 93.

<sup>2</sup> *Hammer v. Schoenfelder*, 47 Wis. 455, fully stated in vol. 1, § 50; *Vickery v. McCormick*, 117 Ind. 594; *Jones v. National Printing Co.*, 13 Daly (N. Y.), 92; *Abbott v. Hapgood*, 150 Mass. 248; *Van Winkle v. Wilkins*, 81 Ga. 93; *Eagle Tube Co. v. Edward Barr Co.*, 32 N. Y. St. Rep. 299; S. C., 10 N. Y. Supp. 113; *Richardson v. Chynoweth*, 26 Wis. 656; *Hamilton v. Magill*, 12 L. R. Ire. 186; *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Ramsey v. Tully*, 12 Ill. App. 463; *Stewart v. Power*, 12 Kan. 596; *Watson v. Bates*, 5 Up. Can. C. P. 366; *Johnson v. Matthews*, 5 Kan. 122; *Morrison v. Lovejoy*, 6 Minn. 319; *Messmore v. New York S. & L.*

*Co.*, 40 N. Y. 422; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. St. 45.

<sup>3</sup> *Shouse v. Neiswanger*, 18 Mo. App. 236, 244, quoting the text; *Messmore v. New York S. & L. Co.*, 40 N. Y. 422. It was also held in this case that where the article furnished by the seller was not such as the purchaser was entitled to, and the seller was notified to that effect, the purchaser had a right to sell it at the place of delivery for the best price he could obtain, without giving notice to the defendant of the time and place of such sale; that after such sale he could recover from the vendor the difference between the sum paid and the sum realized on the resale.

<sup>4</sup> *Harrow Spring Co. v. Whipple Harrow Co.*, 51 N. W. Rep. 197; — Mich. —.



§ 663. **Same subject; illustrations.** Thus if a vendor in guano knows that the buyer has ordered it for use as a fertilizer and fails to deliver a portion of the quantity ordered, if the latter is unable to procure it elsewhere, the seller is liable for damages equal to the difference in value between the crop raised on the land on which the guano delivered was used and that raised on the same quantity of land of like quality and subjected to the same method of cultivation on which none was used in consequence of his breach.<sup>1</sup> A vendor had notice that the vendee was buying the article, caustic soda — not ordinarily procurable in the market — for the purpose of resale at a distance. It was to be delivered, twenty-five tons in June, twenty-five tons in July, and twenty-five tons in August. None was delivered until September, and then only twenty-six tons. If the vendee could have delivered, on his contract, the soda which the vendor failed to deliver the profit thereon would have been 52*l.* 5*s.* 4*d.* That sum was paid into the court in an action upon the contract. But the vendee had to pay additional cost of transportation [399] on account of the lateness of the season on the part delivered, and a certain sum to his sub-vendee for damages on the subcontract for loss of profits on a resale by him. The court held the vendee was entitled to recover as damages for the defendant's breach the loss of the profit the plaintiff would have derived from the transaction if the defendant had delivered the soda pursuant to his contract. He was held liable for the increased cost of transportation, but not for the damages paid to the sub-vendee. The latter were too remote. On this point Erle, C. J., said: "The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that it is agreed that he is responsible. But he had no notice of the subsequent resale; and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural or necessary consequences of a breach of the contract he was entering into."<sup>2</sup> A vendor contracted to

<sup>1</sup> Bell v. Reynolds, 78 Ala. 511. (N. S.) 445; Elbinger Actien-Gesell-

<sup>2</sup> Borries v. Hutchinson, 18 C. B. schafft von Eisenbahn v. Armstrong,

supply the furniture required for rooms in a hotel; failing to do so, he was liable for the loss resulting from the vendee's inability to use the rooms.<sup>1</sup> In assessing damages against a vendor for breach of a contract to deliver certain bridge timber to be manufactured by him, where the purchaser had procured it otherwise at an increased cost, the court held that if the course pursued by the purchaser in obtaining the timber was the only way in which it could be obtained, or was the ordinary and usual or a reasonable and prudent way of obtaining it, the difference between the contract price and the higher cost of the timber thus obtained might be recovered as damages naturally arising from the breach itself. If the course pursued by the purchaser was not the ordinary and usual way, and would not be a reasonable or prudent one, were it not for an engagement into which the purchaser had entered with a third party for the completion, within a limited time, of the bridges for which the timber was contracted to be furnished, the purchaser cannot recover the increased cost he has been obliged to incur in order to fulfill such engagement, unless its nature was known to the vendor at the time the contract was made. But if so made known, the purchaser may recover the difference between the contract price and the higher cost, at which, acting in good faith and with reasonable diligence and prudence, he has been obliged to obtain the kind and quantity of timber contracted for in order to fulfill his engagement; for these damages may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of its breach.<sup>2</sup>

§ 664. **Damages for delay.** Damages for delay in delivery of property sold or contracted for may be recovered according to circumstances. Where it has been paid for the jury may allow, if there is no proof of special damage, interest on the price from the time it should have been until it actually is delivered.<sup>3</sup> If there has been a decline in the market value

L. R. 9 Q. B. 473; *Hinde v. Liddell*,  
L. R. 10 Q. B. 265; *Sawdon v. Andrew*, 30 L. T. 23; *Masterton v. Mayor*,  
7 Hill, 61; *Grebert-Borgnis v. Nugent*,  
15 Q. B. Div. 85.

<sup>1</sup> *Berkey & G. Furniture Co. v. Has-*  
*call*, 123 Ind. 502.

<sup>2</sup> *Paine v. Sherwood*, 21 Minn. 225;  
*Feehan v. Hallinan*, 13 Up. Can. Q.  
B. 440.

<sup>3</sup> *Edwards v. Sanborn*, 6 Mich. 348.

at the time of the delayed delivery damages for the delay may be assessed at the amount of the depreciation.<sup>1</sup> In *Merrimack Manufacturing Co. v. Quintard*<sup>2</sup> it was held that, inferior coal having been delivered after the contract time, the vendee was entitled to the difference between the value at the place of delivery of the coal called for by the contract and the value of the coal delivered as damages for the inferior quality; and that the measure of damages for failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance which had to be paid by the purchaser and the average rate during the time covered by the contract for monthly deliveries. It was also held that evidence was admissible that freight on coal was usually higher in the autumn than in summer, to show what was in contemplation of the parties, and that the loss occasioned by the increase in freight is properly to be recovered as damages. But it has been held in a comparatively recent case that compensation for delay in delivering plank intended for a road does not include the increased expense of laying the plank by reason of such delay; that such damages are too indefinite.<sup>3</sup> Sharswood, J., said: "To say that the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carriers seems to be entirely too indefinite. It would include a rise in wages, stormy weather, bad roads in consequence, which would be entirely beyond what would naturally have been within the view of the parties, and might well have happened even had the railroad company punctually performed their duty. The natural consequences of delay and stoppage of work, payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been, form the rule."<sup>4</sup> It seems but reasonable that the purchaser should so far rely upon the vendor's punctual performance of his contract as to be justified in making necessary preparations to

<sup>1</sup>*Spiers v. Halsted*, 74 N. C. 620;

<sup>2</sup>107 Mass. 127.

*Startup v. Cortazzi*, 2 Cr., M. & R.

165; *Clements v. Hawkes Manuf. Co.*, etc. Co., 71 Pa. St. 350.

107 Mass. 362.

<sup>4</sup>*Id.*

receive the property he has agreed to deliver, and that these should be compensated for by the vendor if he does not perform;<sup>1</sup> but this is not the rule in Pennsylvania if he has no notice of the circumstances.<sup>2</sup> Where the defendant agreed to construct a ship which he knew was intended to carry passengers to Australia, and special damages were claimed for delay in completing it, in this, that if the ship had been delivered according to the contract the plaintiffs would have made a profit of £7,000 on the voyage, but, in consequence of a fall in freight, they made only £4,280 after the vessel was delivered, the jury gave a verdict for the plaintiff for £2,750 damages, which the court refused to set aside.<sup>3</sup>

§ 665. **Same subject.** A vendor agreed to deliver by a stipulated day a steam-engine, intended, as he knew, to drive machinery for the sawing and planing of lumber. It was not delivered till a week after the day fixed. In the assessment of damages for the breach of contract in this delay, the vendee proved that the net average value of the engine at the time and place, and for the purpose intended, was \$50 a day beyond the wear and tear of the machinery and the cost of running it. This result was obtained by a calculation of the wear and tear of the machinery, the cost of running it, and the amount of lumber it would saw and plane in a day, together with the prices which the vendee received for the sawing and planing. This mode of arriving at the damages was rejected. It was held that the proper rule for estimating them was to ascertain what would have been a fair price to pay for the use of the engine and machinery in view of all the hazards and chances of business.<sup>4</sup> Some general principles were laid down in the decision of this case which have been extensively quoted with approval. It was held that the rule which precludes the allowance of profits by way of damages is not a primary rule, but a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained; that it is a well established rule of the common law that the

<sup>1</sup> Chatham v. Jones, 69 Texas, 744.

<sup>3</sup> Fletcher v. Tayleur, 17 C. B. 21.

<sup>2</sup> Billmeyer v. Wagner, 91 Pa. St. See Blanchard v. Ely, 21 Wend. 342.  
92.

<sup>4</sup> Griffin v. Colver, 16 N. Y. 489.



damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; that it is under this rule that profits are excluded from the estimate in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. It was remarked that nearly every element entering into the vendee's computation of damages would have been of that uncertain character which has uniformly prevented a recovery for speculative profits. Selden, J., said: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or [403] contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural and even necessary result of the breach; and yet, if in their nature uncertain, they must be rejected. . . . So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach but for some special circumstances, collateral to the contract itself, or foreign to its apparent object, they cannot be recovered."<sup>1</sup>

In a suit to recover damages for the non-delivery of a planing machine, it appeared that the plaintiff, a resident of Iowa,

<sup>1</sup> Freeman v. Clute, 3 Barb. 424; vol. 1, §§ 53, 58, 59.

came to the defendant's warehouse in Chicago and bought the machine, which he selected with reference to its weight and finish. He paid \$100 in hand, and was to pay \$450 more on its delivery at his residence in Iowa. The contract was that he was to have the identical machine he had selected, which was to be shipped when ordered. The plaintiff returned home to put up his shafting and pulleys, with the understanding that he was to send for the machine as soon as he should be ready to put it up. He ordered it by letter on the 13th or 14th of March, and after a delay of fifteen or sixteen days received a letter saying that a machine had been shipped to him. He declined to receive any machine except the one bought; he demanded it, and it was refused on the 13th of April, and on the same day he bought another machine. On the trial the plaintiff offered to prove that he had erected a building, and put in a steam-engine and shafting at an expense of \$5,000, with a view to the use of this machine; that the defendant had notice of this when the contract was made; that it all lay idle for thirty-five days in consequence of the defendant's breach of his contract. It was held that such evidence was admissible; that, in arriving at the damages which the plaintiff was entitled to recover, he should be allowed to show what would have been a fair rent for the use of the building and machinery, if in running order, during the time they lay idle in consequence of the defendant's refusal to deliver the machine; though he should not be allowed for any longer time than was reasonably necessary for supplying himself with another machine of similar character, after being advised of the defendant's refusal to send the one purchased; and should not be allowed anything for probable profits.<sup>1</sup>

§ 666. **Same subject.** An English case illustrates this principle in a striking manner. The defendant had contracted to furnish a steam threshing-machine on a fixed day, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field; so that it could be sent at once to market. He failed to deliver the machine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by a thunder-storm, and it was necessary to kiln-dry a part of it; its market value was thereby diminished, and

<sup>1</sup> *Benton v. Fay*, 64 Ill. 417.

before it could be sold the market price had fallen. It was held that plaintiff was entitled to recover damages for the expense of carting and stacking the wheat, for the loss by reason of the exposure to the weather, including the expense of kiln-drying. In respect to these items Lord Campbell, C. J., said: "The plaintiff, who was a large farmer, was known by the defendant to be accustomed to thresh out his wheat in the field; he gave the order for the threshing-machine, which, it was agreed, should be delivered on the 14th of August, at which time the wheat might reasonably be expected to be ripe for threshing; the defendant knew that it was wanted for that purpose. Then, was it not in the contemplation of the parties that, if it was not delivered at that time, damage by rain might ensue to the plaintiff? The thunder-storm occurred, and the plaintiff's wheat was damaged. If the engine had been delivered at the time agreed upon, the corn would have been threshed out, and would have been carried to market in good condition, instead of which it was damaged. Is not this injury a natural consequence of the breach of contract? And may it not reasonably be supposed to have been foreseen by the parties? . . . Therefore, as respects those items for which the plaintiff claims damages as resulting from the falling of the rain, I am of opinion that he is entitled to recover. But, as respects [405] the fall of the market price of wheat in respect of which he claims damages, my opinion is quite different; because it could not have been foreseen by the parties that the market would fall; it was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract."<sup>1</sup> This discrimination between a loss from exposure to rain and loss from fall in the market price does not appear to have caused any criticism, although the case has been frequently referred to.<sup>2</sup> The latter,

<sup>1</sup> *Smeed v. Foord*, 1 E. & E. 602; See *Friend & T. Lumber Co. v. Miller*, 67 Cal. 464 (holding that damages caused by delay may be recovered, but not those which result from a failure to perform); *Van Winkle v. Wilkins*, 81 Ga. 93 (depreciation of cotton-seed while the owner was awaiting the arrival of machinery, recovered for).

<sup>2</sup> In *Wood's Mayne on Damages*, p. 35, the following is said in respect to *Smeed v. Foord*, 1 E. & E. 602: "The concluding part of the above ruling was put upon a finding of fact, viz: that the parties could not have contemplated a fall in the market as one of the natural consequences of a breach of contract. Upon this

however, arose as proximately from the delay in furnishing the machine as the other loss did; neither could have been foreseen; both did occur; and the parties must have known when the bargain was made that, if the vendor delayed performance, a loss from rain or from fall in the market was equally possible. The machine was relied upon to do the threshing, and the circumstances were such that the court held that the plaintiff was entitled to rely upon it. Had the storm destroyed the entire crop, notwithstanding such exertions of the plaintiff to prevent it as the law required him to make, the defendant, on the principle of the decision, would have been liable for its value; and that value would be the market value at the time of the loss, or at the date when, by reason of the breach of contract, the plaintiff was prevented from realizing the value by sale. On the principle that the injured party is to be placed in as good a situation by damages [406] as he would have been in if the contract had been performed, the value should be assessed, in the case supposed, at the time when, but for the defendant's breach of contract, the wheat would have been taken to market. In the actual case the plaintiff was entitled to that measure of damages, less the value of what he was able to save from destruction by the precautions he took and was required to take. As the plaintiff's exertions, for this purpose, were rendered necessary by the defendant's breach of contract, he was bound to make compensation for them; he was relieved thereby from paying the value of a totally lost crop.<sup>1</sup> The net amount saved was its value, then, after satisfying the charges for the saving; and this, taken from the total value which would otherwise

point, however, it is difficult to see the distinction between this case and the other cases quoted below: *Collard v. South Eastern Ry. Co.*, 7 H. & N. 79; *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; 34 L. J. (C. P.) 169; *Ward v. New York C. R. Co.*, 47 N. Y. 29. If the defendant had undertaken to thresh the plaintiff's wheat and hand it over to him, and, in consequence of his delay, the market had fallen, these cases decide that the

loss so incurred would have been part of the natural loss arising from breach of contract. Here the defendant only undertook to supply him with a threshing-machine. But every consequence which legally followed from the breach of the contract to thresh followed as an equally natural consequence from a breach of contract to supply the means of threshing."

<sup>1</sup> Vol. 1, § 88.



have been lost, would leave, according to familiar analogies, the amount of the plaintiff's actual loss. By this method of computation the loss from a decline in the market would fall on the defendant.<sup>1</sup>

The agreement of a carrier to deliver is like a vendor's agreement to deliver, and the same rule of damages is applied. A loss from a fall in the market at the time of a delayed delivery arises directly from the breach of contract.<sup>2</sup> Here the liability would end, if the whole property were finally delivered without diminution or deterioration, unless there are special circumstances which enter into the contract and give it more scope. A contract to deliver a threshing-machine at a given time to enable a farmer to thresh his wheat, with a view to its being taken at once to market, is not simply a contract to deliver a machine; it is a contract to do, at a specified time, one of a known series of acts for the purpose of getting the wheat immediately to market. The general damages arising from delay in delivering property or the failure to deliver it in proper condition may be mitigated by proof of subsequent delivery or of repairs made by the vendor.<sup>3</sup>

[407] § 667. **Warranties of quality and of title.** To determine whether a warranty exists is often a difficult question. On an executory contract for the sale and delivery of goods of a particular description the vendee is not obliged to receive and pay for those offered, unless they correspond therewith. The contract to furnish such goods is strictly a precedent condition. When the vendor offers goods the maxim *caveat emptor* warns the vendee to make due examination, and reject them if they do not conform to the require-

<sup>1</sup> See *Ward v. New York C. R. Co.*, 47 N. Y. 177; *Collard v. South Eastern Ry. Co.*, 7 H. & N. 79; *The Panama*, 1 P. Div. 452.

<sup>2</sup> *Ward v. New York C. R. Co.*, *supra*; *Sturgess v. Bissell*, 46 N. Y. 462; *Weston v. Grand Trunk R. Co.*, 54 Me. 376; *Peet v. Chicago, etc. R. Co.*, 20 Wis. 594; *Medbury v. New York & C. R. Co.*, 26 Barb. 564; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Briggs v. New York R. Co.*, 28 Barb. 515; *Colvin v. Jones*, 3 Dana,

576; *Cowley v. Davidson*, 13 Minn. 92; *Collins v. Baumgardner*, 52 Pa. St. 461; *Atkisson v. Steamboat C. G.*, 28 Mo. 124; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531; *Wilson v. Lancashire R. Co.*, 9 C. B. (N. S.) 632; *Ingledeu v. Northern R.*, 7 Gray, 88; *Spring v. Haskell*, 4 Allen, 112; *Cutting v. Grand Trunk Ry. Co.*, 13 id. 381.

<sup>3</sup> *Marsh v. McPherson*, 105 U. S. 709.

ments of the contract. If they are apparently goods of the kind so required, are tendered on the contract, and unconditionally received without objection, the right to object is waived in respect to any want of conformity which could have been ascertained by a careful examination. The tender and acceptance make the contract an executed one for the sale and purchase of specific articles.<sup>1</sup>

It is not always practicable or possible, by inspection at the time of delivery, to determine whether property offered upon an existing contract, or for sale, possesses certain qualities which the purchaser is charged for in the price. To some extent the law implies a warranty; but beyond this, the purchaser must assure himself against loss from defects or want of fitness for his purpose by inspection, or by obtaining a warranty. The vendee is entitled to an opportunity to make such examination of the goods offered on an existing contract as will enable him to ascertain whether they fulfill its requirements; and if they are of such a nature that qualities or fitness stipulated for can only be ascertained by the use or consumption of the property, or for any reason are intended to be ascertained before the title passes, the contract in respect to them is a warranty. Such a case is precisely like any bargain and sale with a representation or warranty of qualities or fitness.<sup>2</sup>

But in case of a sale of specific goods, there being no [408] undertaking to furnish those of particular quality or fitness; and when goods are delivered on an existing contract requiring a particular quality, the absence or presence of which can

<sup>1</sup> *Parks v. O'Connor*, 70 Tex. 377, 387; *Woods v. Cramer*, 34 S. C. 508.

<sup>2</sup> *Philadelphia Whiting Co. v. Detroit White Lead Works*, 58 Mich. 29; *Lee v. Sickles Saddlery Co.*, 38 Mo. App. 201; *Day v. Pool*, 52 N. Y. 416; *Foot v. Bentley*, 44 id. 166; *Howie v. Rea*, 70 N. C. 559; *Polhemus v. Heiman*, 45 Cal. 573; *Thomas v. Francis*, 12 Ind. 282; *Esty v. Read*, 29 Vt. 278; *Dounce v. Dow*, 57 N. Y. 16; *Hoe v. Sanborn*, 21 id. 532; *Brantley v. Thomas*, 22 Tex. 270; *Parks v. Morris*

*Ax, etc. Co.*, 54 N. Y. 586; *Baird v. Mathews*, 6 Dana, 130; *Lewis v. Roundtree*, 78 N. C. 323; *Pease v. Sabin*, 38 Vt. 432; *Wolcott v. Mount*, 36 N. J. L. 262; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Hoey*, 23 Wend. 350; *Murray v. Smith*, 4 Daly, 277; *Seigworth v. Leffel*, 76 Pa. St. 476; *Brown v. Burhans*, 4 Hun, 227; *Kimball & A. Manuf. Co. v. Vroman*, 35 Mich. 310; *Dill v. O'Ferrell*, 45 Ind. 268; *Cox v. Long*, 69 N. C. 7.

be seen on mere view, the purchase is without warranty; or their acceptance without objection leaves the seller relieved of all responsibility for the goodness, quality or fitness of the property.<sup>1</sup> But if the goods delivered differ from those contracted for in kind or generic description, and there is no other acceptance than receipt and use of those furnished, the intention to deliver or accept them on the contract will not be inferred, and the vendor will only be entitled to recover for them on a *quantum meruit*.<sup>2</sup> In a recent case<sup>3</sup> Mellor, J., thus sums up and classifies the English cases: "First. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.<sup>4</sup> The buyer in such case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular [409] quality or are merchantable.<sup>5</sup> So in the case of a sale in the market of meat, which the buyer had inspected, but which was in fact diseased and unfit for food, the maxim

<sup>1</sup> Titley v. Enterprise Stone Co., 127 Ill. 457; Howard v. Hoey, 23 Wend. 350; Hart v. Wright, 17 id. 267; Locke v. Williamson, 40 Wis. 377; Delafield v. De Grauw, 3 Keyes, 467; Muller v. Eno, 3 Duer, 421; S. C., 14 N. Y. 597; Wilkins v. Stevens, 8 Vt. 214; Houghton v. Carpenter, 40 Vt. 588; Reed v. Randall, 29 N. Y. 358; Fitch v. Carpenter, 43 Barb. 40; Cole v. Champlain T. Co., 26 Vt. 87; Barnard v. Kellogg, 10 Wall. 388; Hyatt v. Boyle, 5 Gill & J. 110; Hargous v. Stone, 5 N. Y. 73; Merriam v. Field, 39 Wis. 578; McClung v. Kelley, 21 Iowa, 507; Hamilton v. Ganyard, 34 Barb. 204; Cleu v. McPherson, 1 Bosw. 480; Morehouse v. Comstock, 42 Wis. 626; Jones v. Murray, 3 T. B. Mon. 83; Emerson v. Bingham, 10

Mass. 197; Moses v. Mead, 1 Denio, 378; 5 id. 617; Hyland v. Sherman, 2 E. D. Smith, 234; Gaylord Manuf. Co. v. Allen, 53 N. Y. 515; Ranger v. Hearne, 37 Tex. 30.

<sup>2</sup> Murray v. Farthing, 6 Mo. 251; Andrews v. Eastman, 41 Vt. 134.

<sup>3</sup> Jones v. Just, L. R. 3 Q. B. 197, 202.

<sup>4</sup> Parkinson v. Lee, 2 East, 314.

<sup>5</sup> In Hinckley v. Kersting, 21 Ill. 247, it was held that the rule of *caveat emptor* applies to a banker or broker who deals in depreciated bills as an article of commerce; and if a bank bill purchased by him proves to be of less value than the price given for it, the vendor is not bound to make it good, where the transaction is in good faith.

*caveat emptor* applies.<sup>1</sup> Secondly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.<sup>2</sup> Thirdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty; there is no warranty that it shall answer the particular purpose intended by the buyer.<sup>3</sup> Fourthly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.<sup>4</sup> In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.<sup>5</sup> Fifthly.

<sup>1</sup> *Emerton v. Mathews*, 7 H. & N. 586.

<sup>2</sup> *Hege v. Newsom*, 96 Ind. 426; *Burr v. Gibson*, 3 M. & W. 390. See *ante*, p. 1489; *Kohl v. Lindley*, 39 Ill. 195; *Humphreys v. Comline*, 8 Blackf. 516; *McGuire v. Kearney*, 17 La. Ann. 295; *Deming v. Foster*, 42 N. H. 165; *Moses v. Mead*, 1 Denio, 378; *Mixer v. Coburn*, 11 Met. 559; *Joslin v. Coughlin*, 26 Miss. 134; *Holden v. Dakin*, 4 Johns. 421; *Bartlett v. Hoppock*, 34 N. Y. 118; *Bowman v. Clemmer*, 50 Ind. 10; *Fountleroy v. Wilcox*, 80 Ill. 477; *McCrea v. Longstreet*, 17 Pa. St. 316.

<sup>3</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Dounce v. Dow*, 64 N. Y. 411; *Deming v. Foster*, 42 N. H. 165; *McGraw v. Fletcher*, 35 Mich. 104; *Bragg v. Morrill*, 49 Vt. 45.

<sup>4</sup> *Brown v. Edgerton*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533.

<sup>5</sup> *Dayton v. Hooglund*, 39 Ohio St. 671; *Jones v. George*, 61 Texas, 345;

*Fox v. Stockton Harvester, etc. Works*, 83 Cal. 333; *Poland v. Miller*, 95 Ind. 387; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Dunshane v. Benedict*, 120 id. 630; *Hoe v. Sanborn*, 21 N. Y. 553; *Beals v. Olmstead*, 24 Vt. 114; *Brown v. Sayles*, 27 Vt. 227; *Sims v. Howell*, 49 Ga. 620; *Parks v. Morris, etc. Co.*, 54 N. Y. 586; *Gammell v. Gunby*, 52 Ga. 504; *Richardson v. Grandy*, 49 Vt. 22; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Dutton v. Gerriish*, 9 Cush. 89; *French v. Vining*, 102 Mass. 135; *Mallan v. Radloff*, 17 C. B. (N. S.) 588; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Leopold v. Van Kirk*, 27 Wis. 152; *Brown v. Murphee*, 31 Miss. 91; *Robinson M. Works v. Chandler*, 56 Ind. 575; *Brenton v. Davis*, 8 Blackf. 317; *Orton v. Phelan*, 2 Head, 445; *Beers v. Williams*, 16 Ill. 69; *Boyd v. Crawford, Add. (Pa.)* 150; *Cunningham v. Hall*, 1 Sprague, 404; *Walton v. Cody*, 1 Wis. 420.



[410] Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."<sup>1</sup>

It might be inferred, from what is said of the first class, that no distinction is observed between articles purchased for food and other merchandise; that if a purchaser has an opportunity for inspection, there is no implied warranty that the provisions are sound and wholesome. But it is believed that in all sales of provisions for consumption there is an implied warranty in this country.<sup>2</sup> In case of a sale by sample, there is an implied warranty that the bulk of the goods sold is equal in quality to the sample;<sup>3</sup> except in Pennsylvania, where

<sup>1</sup>Laing v. Fidgeon, 4 Camp. 169; S. C., 6 Taunt. 108; Mann v. Evers-ton, 32 Ind. 355; Leopold v. Van Kirk, 27 Wis. 152; Walton v. Cody, 1 id. 420; Gaylord Manuf. Co. v. Allen, 53 N. Y. 515; Howard v. Hoey, 23 Wend. 350; Hamilton v. Ganyard, 34 Barb. 204; Morehouse v. Comstock, 42 Wis. 626; Ketchum v. Wells, 19 id. 25; Cleu v. McPherson, 1 Bosw. 480; McClung v. Kelley, 21 Iowa, 508; Merriam v. Field, 39 Wis. 578. See Holden v. Clancy, 41 How. Pr. 1.

<sup>2</sup>Winsor v. Lombard, 18 Pick. 57, Hoover v. Peters, 18 Mich. 51; Divine v. McCormick, 50 Barb. 116; Davis v. Murphy, 14 Ind. 158; Os-good v. Lewis, 2 Harr. & G. 495; Emerson v. Brigham, 10 Mass. 197; Van Bracklin v. Fonda, 12 Johns. 468; Marshall v. Peck, 1 Dana, 612; Humphreys v. Comline, 8 Blackf. 516; Ryder v. Neitge, 21 Minn. 70; Moses v. Mead, 1 Denio, 378; S. C., 5 id. 617; Hart v. Wright, 17 Wend. 267; Hyland v. Sherman, 2 E. D. Smith, 234; Goldrich v. Ryan, 3 id. 324; French v. Vining, 102 Mass. 132. See Howard v. Emerson, 110 Mass. 320.

In Benj. on Sales, § 672, it is said that the responsibility of a victualer, vintner, brewer, butcher or cook for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute that they shall make good any damage caused by their sale of unwholesome food. Burnby v. Bollett, 16 M. & W. 644. See Chitty on Cont. 420; 3 Black. Com. 166. But see Sinclair v. Hathaway, 57 Mich. 60.

<sup>3</sup>Myer v. Wheeler, 65 Iowa, 390; Bach v. Levy, 101 N. Y. 511; Oneida Manuf. Co. v. Lawrence, 4 Cow. 440; Andrews v. Kneeland, 6 id. 354; Sands v. Taylor, 5 Johns. 395; Gallagher v. Waring, 9 Wend. 20; Beebee v. Robert, 12 id. 413; Boorman v. Johnston, id. 566; Moses v. Mead, 1 Denio, 386; Brower v. Lewis, 19 Barb. 574; Beirne v. Dord, 5 N. Y. 95; Hargous v. Stone, id. 73; Messenger v. Pratt, 3 Lans. 234; Leonard v. Fowler, 44 N. Y. 289; Gurney v. Atlantic, etc. Ry. Co., 58 id. 358; Williams v. Spafford, 8 Pick. 250; Hastings v. Lovering, 2 id. 219; Lothrop v. Otis, 7 Allen. 435; Rose v. Beattie, 2 N. & McC. 538; Bradford

a sale by sample is a guaranty only that the article delivered shall follow its kind and be simply merchantable.<sup>1</sup> The description or name by which goods are sold is a war- [411] ranty that they are such as are known or pass by that description or name.<sup>2</sup>

§ 668. **Same subject.** There is an implied warranty of title, but only when the vendor has possession of the property sold.<sup>3</sup>

v. Manly, 13 Mass. 139; Henshaw v. Robins, 9 Met. 86; Whittaker v. Hueske, 29 Tex. 355; Brantley v. Thomas, 22 id. 270.

<sup>1</sup>Boyd v. Wilson, 83 Pa. St. 319; West Republic Mining Co. v. Jones, 108 id. 55, 65.

<sup>2</sup>Miller v. Moore, 83 Ga. 684; Bach v. Levy, 101 N. Y. 511; Bridge v. Wain, 1 Stark. 504; Bannerman v. White, 10 C. B. (N. S.) 844; Behn v. Burness, 3 B. & S. 755; Chanter v. Hopkins, 4 M. & W. 404; Allan v. Lake, 18 Q. B. 560; Josling v. Kingsford, 13 C. B. (N. S.) 447; Hawkins v. Pemberton, 51 N. Y. 204; Osgood v. Lewis, 2 Harr. & G. 495; Henshaw v. Robins, 9 Met. 83; Borekins v. Bevan, 3 Rawle, 23; White v. Miller, 71 N. Y. 118; Moore v. King, 57 Hun, 224.

<sup>3</sup>Scranton v. Clark, 39 Barb. 273; 39 N. Y. 220; Brown v. Smith, 5 How. (Miss.) 387; McCoy v. Artcher, 3 Barb. 323; Gross v. Kierski, 41 Cal. 111; Thurston v. Spratt, 52 Me. 202; Boyd v. Whitfield, 19 Ark. 447; Scott v. Hix, 2 Sneed, 192; Miller v. Van Tassel, 24 Cal. 458; Bennett v. Bartlett, 6 Cush. 225; Case v. Hall, 24 Wend. 101; Vibbard v. Johnson, 19 Johns. 77; Dorr v. Fisher, 1 Cush. 271; Burt v. Dewey, 40 N. Y. 283; Williamson v. Summers, 34 Ala. 691; Linton v. Porter, 31 Ill. 107; Chancellor v. Wiggins, 4 B. Mon. 201; Trigg v. Faris, 5 Humph. 343; Charlton v. Lay, id. 496; Hale v. Smith, 6 Me. 416; Butler v. Tufts, 13 id. 302; Bucknam v. Goddard, 21 Pick. 70;

Huntington v. Hall, 36 Me. 501; Davis v. Smith, 7 Minn. 414; Chism v. Woods, Hardin, 531; Robinson v. Rice, 20 Mo. 229; Payne v. Rodden, 4 Bibb, 304; Gookin v. Graham, 5 Humph. 480; Word v. Cavin, 1 Head, 506; Whitney v. Heywood, 6 Cush. 82; Sargent v. Currier, 49 N. H. 310; Emerson v. Brigham, 10 Mass. 197; Pratt v. Philbrook, 41 Me. 132; Darst v. Brockway, 11 Ohio, 462; Lines v. Smith, 4 Fla. 47; McCabe v. Morehead, 1 W. & S. 513; Scott v. Scott, 1 A. K. Marsh. 217; Inge v. Bond, 3 Hawks, 101; Colcock v. Goode, 3 McCord, 513; Storm v. Smith, 43 Miss. 497; Shattuck v. Green, 104 Mass. 42; Long v. Hickingbottom, 28 Miss. 772; Mockbee v. Gardner, 2 Harr. & G. 176; Coolidge v. Brigham, 1 Met. 551.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties, on breach of the contract, where no special damage is alleged, the measure of damages is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then, if the vendee is prepared to gather it and carry it to market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when vendee went there to gather the fruit, and

But sales by executors, administrators and other trustees are exceptions; there is no warranty of title in sales by them, unless there be fraud or express warranty and eviction; in which case they would undoubtedly be personally responsible.<sup>1</sup> In case of a failure of title while the purchase-money remains in their hands, undistributed or unadministered, it is suggested that there would exist no well founded reason why they should not refund to the purchaser.<sup>2</sup> *Caveat emptor* applies in all its rigor to judicial sales.<sup>3</sup> It is said by a learned author that the present rule in England may be stated in the following terms: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.<sup>4</sup>

On the sale of a promissory note, bill of exchange, shares or other securities or choses in action there is an implied warranty of the assignor's title, of the genuineness of the evidence of debt or other instrument assigned, and the capacity of the makers to contract.<sup>5</sup> The party accepting the transfer

if those persons forbade him or his agents or servants from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold defendant responsible on the guaranty, as he was not bound to take a portion of the contract. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 171.

<sup>1</sup> *Mockbee v. Gardner*, 2 Harr. & G. 176.

<sup>2</sup> *Id.*

<sup>3</sup> *Corwin v. Benham*, 2 Ohio St. 36;

*Parker v. Rodman*, 84 Ind. 256. See *The Monte Alegro*, 9 Wheat. 616.

<sup>4</sup> *Benj. on Sales*, § 639; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Smith v. Neale*, id. 67; *Chapman v. Speller*, 14 Q. B. 621; *Sims v. Marryat*, 17 id. 281; *Eichholz v. Bannister*, 17 C. B. (N. S.) 708; *Bagueley v. Hawley*, L. R. 2 C. P. 625.

<sup>5</sup> *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Ledwich v. McKim*, 53 id. 307; *Erwin v. Downs*, 15 id. 575; *Bell v. Dagg*, 60 id. 528; *Sherman v. Johnson*, 56 Barb. 59; *Thrall v. Newell*, 19 Vt. 202; *Smith v. McNair*, 19 Kan. 330; *National Bank v. Bangs*, 106 Mass. 441; *Lobdell v. Baker*, 1 Met. 193; *S. C.*, 3 id. 469; *Terry v. Bissell*, 26 Conn. 23; *Wilder v. Cowles*, 100 Mass. 487; *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258; *Shaver v. Ehle*, 16 Johns.

is at liberty to act upon the implied assertion of the [413] validity of the paper, and to bring an action for its collection,<sup>1</sup> and if defeated may recover the costs and expenses so incurred.<sup>2</sup> In case of contest and adverse judgment, the vendor will be concluded by it if he has had notice of the action and an opportunity to be heard.<sup>3</sup>

The indorsement of a promissory note imports a guaranty that the maker was competent to make the note in the character and in the terms in which it was made.<sup>4</sup> The drawee in a forged check who has paid it, after indorsement by the payee named therein, may recover the money from such indorser, if he has given currency to the check by his indorsement made without due inquiry.<sup>5</sup> The measure of damages for breach of this implied warranty is the difference between the value of the paper as it is, and the value it would possess if the warranty had been true; or, if the instrument is void for a cause within the warranty, the assignee is entitled to recover what it would have been worth if conformable to the

201; *Markle v. Hatfield*, 2 id. 455; *Herrick v. Whitney*, 15 id. 240; *Murray v. Judah*, 6 Cow. 484; *Flynn v. Allen*, 57 Pa. St. 482; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Aldrich v. Jackson*, 5 R. I. 218; *Ellis v. Grooms*, 1 Stew. 47; *Bennett v. Buchan*, 61 N. Y. 232; *Furniss v. Ferguson*, 34 id. 485.

In *Harloe v. Foster*, 53 N. Y. 385, it was held that where a creditor unites with others in the release of their debtor, and signs off for a demand which he has previously transferred, he impliedly undertakes to protect the debtor from such demand; and upon payment being enforced against the debtor he can recover from the creditor, although the release was made upon only a nominal consideration.

Where J. made a contract to sell the promissory note of C. to L., when he was not its owner and it was not in his possession, it was held that the

purchase was at the risk of L.; that the law implied no warranty by J. that he had title to the note; that although J. subsequently acquired the title this did not inure to the benefit of L. so as to render effectual a payment by C. to L. in extinguishment of the note. *Scranton v. Clark*, 39 Barb. 273. An assignment of a judgment without recourse implies no warranty that the record is free from error. And on reversal there is no remedy to recover the purchase-money. *Glass v. Reed*, 2 Dana, 168. A refusal to guaranty does not of itself exclude an implied warranty of genuineness. *Bell v. Dagg*, 60 N. Y. 528.

<sup>1</sup> *Delaware Bank v. Jarvis*, 20 N. Y. 226.

<sup>2</sup> *Giffert v. West*, 33 Wis. 617.

<sup>3</sup> *Bell v. Dagg*, 60 N. Y. 528.

<sup>4</sup> *Erwin v. Downs*, 15 N. Y. 575.

<sup>5</sup> *National Bank v. Bangs*, 106 Mass. 441.



implied assurance; or, at least, the consideration and interest.<sup>1</sup> Where a judgment against four defendants was assigned and one of them had been released, it was held that the assignee [414] was entitled to recover the difference in value between a judgment against all, and its value with one released.<sup>2</sup> In England the vendor's liability is not based on the notion of a warranty, but on the obligation in the contract of sale itself to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.<sup>3</sup> The vendee in

<sup>1</sup> Giffert v. West, 33 Wis. 617; Eaton v. Knowles, 61 Mich. 625; Adams v. Bowman, 51 id. 189.

<sup>2</sup> Bennett v. Buchan, 61 N. Y. 222.

In Thrall v. Newell, 19 Vt. 202, the defendant had executed an assignment in these words: "I hereby assign to R. H. T. a note in my favor against T. W. and J. H. P., dated 13th November, 1838, for \$150, payable in one year from date, with use, for value received." It was held that the words "for value received" were not merely descriptive of the note assigned, but that *prima facie*, at least, they imported a sufficient consideration for the assignment; it was also held that such an instrument, describing the property assigned as "a note," must be construed as an express warranty on the part of the defendant that it was a valid note; and that the signers were of sufficient capacity to contract when they executed it; and *quare*, whether such a warranty would not be implied from the sale without words indicating an express warranty. And it appearing that the note was invalid as to one of the makers by reason of his insanity and that an action upon it had been successfully defended by him on that ground, and that the other had removed from the state, it was held that the plaintiff, in an ac-

tion upon the warranty contained in the assignment, was entitled to recover the difference between the actual value of the note and the amount appearing due upon it. See Marshall v. Peck, 1 Dana, 612.

In Pacific Iron Works v. Newhall, 34 Conn. 67, the plaintiff agreed to manufacture and sell to the defendant, for use in his business, a steam-engine with a cut-off known as "Greene's Patent Cut-off," for which they represented that one Green had a patent, and that they had a license from him to make and sell the same; and that it would be of great value to the defendant in connection with the engine, all which representations were untrue. The whole was to be for one agreed price, for which the defendant gave his notes when the engine was delivered. After he had used it for a few months another person claimed the cut-off to be an infringement of his own prior patent, and obtained an injunction against its use by the defendant. Held, that there was a failure of consideration to the extent of the value of the cut-off to the defendant in connection with the engine, and that that amount should be deducted from the price.

<sup>3</sup> Benj. on Sales, § 607; Jones v. Ryde, 5 Taunt. 488; Young v. Cole, 3

such cases can only recover the price paid.<sup>1</sup> In South Carolina a contract of sale for a full price paid for an article [415] always implies a warranty of its soundness.<sup>2</sup> But the parties may agree that the vendee shall take the property at his own risk;<sup>3</sup> nor will a warranty be implied if the vendor be not in possession of the property which he sells;<sup>4</sup> nor against visible defects.<sup>5</sup>

This implied warranty of soundness will exist though there is an express warranty of title;<sup>6</sup> and even though the contract be in writing and under seal,<sup>7</sup> if it is silent on the subject of soundness. A similar rule prevails in Louisiana.<sup>8</sup> The rule in those states is derived from the civil law. Implied warranties are excluded when there is an express warranty on the same subject.<sup>9</sup> And it has been held in some states that where the contract of sale is in writing and contains no warranty, none can be established by parol.<sup>10</sup> But in such cases the silence of the written contract of sale does not negative the implied warranty of title.<sup>11</sup>

No particular form of words is required to constitute a war-

Bing. N. C. 724; *Gompertz v. Bartlett*, 2 E. & B. 849; *Westropp v. Solomon*, 8 C. B. 345.

<sup>1</sup> *Id.*

<sup>2</sup> *Simons v. Walter*, 1 McCord, 70; *Rivers v. Gragett*, *id.* 71; *Thompson v. Lindsay*, 3 Brev. 403; *Wood v. Ashe*, 3 Strobb. 64; *Vaughan v. Campbell*, 1 Brev. 478; *Colcock v. Goode*, 3 McCord, 302.

<sup>3</sup> *Thompson v. Lindsay*, *supra*.

<sup>4</sup> *Galbraith v. Whyte*, 1 Hayw. 535.

<sup>5</sup> *Id.*; *Wood v. Ashe*, 3 Strobb. 64. See *Furman v. Miller*, 1 Brev. 536.

<sup>6</sup> *Pender v. Fobes*, 1 Dev. & Batt. 250; *Houston v. Gilbert*, 3 Brev. 216; *Wells v. Spears*, 1 McCord, 421.

<sup>7</sup> *Wood v. Ashe*, 3 Strobb. 64; *Hughes v. Banks*, 1 McCord, 537.

<sup>8</sup> *Bulkley v. Honold*, 19 How. (U. S.) 390.

Louisiana Civil Code, art. 1764: "There are things which, although not essential to the contract, yet are implied from the nature of such

agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect."

<sup>9</sup> *Shepherd v. Gilroy*, 46 Iowa, 196; *Mumford v. McPherson*, 1 Johns. 414; *Dickson v. Zizinia*, 10 C. B. 602; *Wilson v. Marsh*, 1 Johns. 503; *Carson v. Baillie*, 19 Pa. St. 375; *Smith v. Cozart*, 2 Head, 526; *Parkinson v. Lee*, 2 East, 314; *Willard v. Stevens*, 24 N. H. 271; *Brown v. Smith*, 5 How. (Miss.) 387; *Deming v. Foster*, 42 N. H. 165.

<sup>10</sup> *Reed v. Wood*, 9 Vt. 285; *Smith v. Cozart*, 2 Head, 526; *Bond v. Clark*, 35 Vt. 577. See *Pickard v. McCormick*, 11 Mich. 68.

<sup>11</sup> *Miller v. Van Tassel*, 24 Cal. 458.

ranty; any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty, or received [416] and acted upon as such, will be enough.<sup>1</sup> A general warranty of soundness will only cover defects which are not visible and obvious as such, unless expressly made to do so, or they are fraudulently concealed.<sup>2</sup> It does not cover defects which are perfectly visible and obvious to the senses, and actually known to the party taking the warranty.<sup>3</sup> Where, however, it was conceded that the defect complained of in a horse sold with warranty, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse, nor affect him in the slightest degree, and the purchaser or his agent did not believe, and had no reason to believe, that the defect was anything but a mere blemish, which would never render the horse less useful or capable of service, and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of sale, it was held that this was one of

<sup>1</sup> Robinson v. Harvey, 82 Ill. 58; v. Clark, 35 Vt. 577; Beals v. Olmstead, 24 Vt. 114; House v. Fort, 4 Blackf. 293; Humphreys v. Comline, 8 id. 507; Hahn v. Doolittle, 18 Wis. 196; McGregor v. Penn, 9 Yerg. 74; Henson v. King, 3 Jones' L. 419; Ricks v. Dillahunty, 8 Port. 133; Murphy v. Gay, 37 Mo. 535; Carter v. Black, 46 id. 384; O'Neal v. Bacon, 1' Houst. 215; Osgood v. Lewis, 2 H. & G. 495; Otts v. Alderson, 10 S. & M. 476; Blythe v. Speake, 23 Tex. 429; Weimer v. Clement, 37 Pa. St. 147; McFarland v. Newman, 9 Watts, 55.

<sup>2</sup> Vanderwalker v. Osmer, 65 Barb. 556; Brown v. Bigelow, 10 Allen, 262; Chadsey v. Green, 24 Conn. 563; Dillard v. Moore, 7 Ark. 466; Fisher v. Pollard, 2 Head, 314; Mulvany v. Rosenberger, 18 Pa. St. 203; Dana v. Boyd, 2 J. J. Marsh. 587; Hudgins v. Perry, 7 Ired. 105; Pinney v. Andrews, 41 Vt. 631; Benj. on Sales, § 616.

<sup>3</sup> Hill v. North, 34 Vt. 604.

Swett v. Colgate, 20 Johns. 196; Chapman v. Murch, 19 id. 290; Carley v. Wilkins, 6 Barb. 557; Warren v. Van Pelt, 4 E. D. Smith, 202; Rogers v. Ackerman, 22 Barb. 134; Lawton v. Keil, 61 id. 558; Hawkins v. Pemberton, 51 N. Y. 198; White v. Miller, 71 id. 118; Stroud v. Pierce, 6 Allen, 413; Stone v. Denny, 4 Met. 151; Morrill v. Wallace, 9 N. H. 111; Henshaw v. Robins, 9 Met. 83; Hillman v. Wilcox, 30 Me. 170; Bryant v. Crosby, 40 id. 18; Randall v. Thornton, 43 id. 226; Wolcott v. Mount, 36 N. J. L. 262; Taylor v. Bullen, 5 Exch. 779; Shepherd v. Kain, 5 B. & Ald. 240; Freeman v. Baker, 5 B. & Ad. 797; Power v. Barham, 4 A. & E. 473; Hopkins v. Tanqueray, 15 C. B. 130; Powell v. Horton, 2 Bing. N. C. 668; Allan v. Lake, 18 Q. B. 560; Hawkins v. Berry, 10 Ill. 36; Towell v. Gatewood, 5 id. 22; Ender v. Scott, 11 Ill. 35; Bond

those equivocal defects that a warranty may well be considered as taken to guard against.<sup>1</sup>

The rule excluding from a warranty defects known to [417] the purchaser only applies to such as are perfectly obvious, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them; but all other defects, though apparent to some extent, but still equivocal and doubtful in their character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundness, must be understood to be included in and covered by a general warranty.<sup>2</sup>

For mere breach of warranty the sale cannot be rescinded by return of the property after it has been delivered and accepted so as to vest the title in the purchaser, unless the contract gives that option or requires it.<sup>3</sup> But in some states a warranty is considered in the nature of a condition subsequent at the election of the vendee; and upon a breach of it he may rescind the contract by returning the property.<sup>4</sup> If, by the terms of the contract, the purchaser is required absolutely to return the property if found defective or in any wise not con-

<sup>1</sup> Hill v. North, 34 Vt. 604.

<sup>2</sup> Miller v. Moore, 83 Ga. 684; Hill v. North, 34 Vt. 604. See Callaway v. Quattlebum, 19 Ga. 277.

<sup>3</sup> Minneapolis H. Works v. Bonnallie, 29 Minn. 373; Merrick v. Wiltse, 37 id. 41; Street v. Blay, 2 B. & Ad. 256; Gompertz v. Denton, 1 Cr. & M. 207; Poulton v. Lattimore, 9 B. & C. 259; Parsons v. Sexton, 4 C. B. 899; Dawson v. Collis, 10 C. B. 530; Cutter v. Powell, 2 Smith Lead. Cas. 26; Wright v. Davenport, 44 Tex. 164; Thornton v. Wynn, 12 Wheat. 183; Withers v. Greene, 9 How. (U. S.) 213; Lyon v. Bertram, 20 id. 149; Voorhees v. Earl, 2 Hill, 288; Cary v. Gruman, 4 id. 625; Muller v. Eno, 14 N. Y. 601, per Comstock, J.; Kase v. John, 10 Watts, 107; Lightburn v. Cooper, 1 Dana, 273; Allen v. Anderson, 3 Humph. 581; Williams v. Hart, 2 id. 68; West

v. Cutting, 19 Vt. 536; Hoadly v. House, 32 id. 179; Mayor v. Dwinell, 29 id. 298; Matteson v. Holt, 45 id. 336; Day v. Pool, 52 N. Y. 416; Rust v. Eckler, 41 id. 488; Milton v. Rowland, 11 Ala. 732; Scranton v. Mechanics' T. Co., 37 Cal. 130; Freeman v. Clute, 3 Barb. 424; Myer v. Wheeler, 65 Iowa, 390; Miller v. Moore, 83 Ga. 684.

<sup>4</sup> Door v. Fisher, 1 Cush. 271; Perley v. Balch, 23 Pick. 283; Conner v. Henderson, 15 Mass. 319; Kimball v. Cunningham, 4 id. 502; Bryant v. Isburgh, 13 Gray, 607; Hyatt v. Boyle, 5 Gill & J. 110; Taymon v. Mitchell, 1 Md. Ch. 496; Franklin v. Long, 7 Gill & J. 407; Rutter v. Blake, 2 Harr. & J. 353; Boothby v. Scales, 27 Wis. 626; Wardle v. Whitney, 23 id. 55; Merrill v. Nightingale, 39 id. 247.



formable to the warranty, with a view to the substitution of [418] other property, or rescission, then the vendee will have no right of action on the warranty without returning or offering to return it.<sup>1</sup>

It is nowhere obligatory to return the goods, unless it is required by the contract. The buyer may sue immediately on the breach; his action accrues at once on the completion of the sale, if the goods are not according to the warranty.<sup>2</sup> This is so, notwithstanding any difficulty or inability of the purchaser then to ascertain the quality or condition of the property.<sup>3</sup> If the buyer is required to return the property on ascertaining its defect and does not do so, he cannot recover for expenses incurred after its condition is known to him.<sup>4</sup>

§ 669. **Damages on breach of warranty of title.** The measure of damages for breach of the warranty of title, it might be expected, would be at least what would be recoverable for failure to deliver; that is, the value of the property lost by the defect of title,<sup>5</sup> at the time of the breach, which is, in the absence of any stipulation, when there is an absolute refusal to deliver or a distinct announcement of inability to do so.<sup>6</sup> A loss of property through a want of title is precisely the same to the vendee as a loss of it because the vendor fails to deliver, and the latter is equally the cause in either case, by violating his contract. The value of the property at the time the vendee is dispossessed has been held to be the measure of damages.<sup>7</sup> Generally, however, the measure has been

<sup>1</sup> Davis v. Gosser, 41 Kan. 414; Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129; Sessions v. Hartsook, 23 Ark. 519; Mayor v. Dwinell, 29 Vt. 298.

Under a warranty that a horse is sound and kind, and if he should not suit the seller would take him back and send the purchaser another, held, that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness; that the horse being unsound and having died, the purchaser could recover damages, and

was not obliged to call upon the seller to furnish another horse. *Perine v. Serrell*, 30 N. J. L. 454.

<sup>2</sup> Vincent v. Leland, 100 Mass. 432; Hammar Paint Co. v. Glover, 47 Kan. 15.

<sup>3</sup> Allen v. Todd, 6 Lans. 222.

<sup>4</sup> Newberry v. Bennett, 38 Fed. Rep. 308; Draper v. Sweet, 66 Barb. 145; Nye v. Iowa City Alcohol Works, 51 Iowa, 129; Murphy v. McGraw, 74 Mich. 318.

<sup>5</sup> Routh v. Caron, 64 Texas, 289.

<sup>6</sup> Lister v. Windmuller, 52 N. Y. Super. Ct. 407.

<sup>7</sup> Grose v. Hennessy, 13 Allen,

stated to be the purchase-money and interest;<sup>1</sup> thus adopting the same rule that is usually applied in estimating the damages for breach of covenants for title to real estate.<sup>2</sup> There can be no recovery on warranty for more than nominal [419] damages unless the paramount title has been asserted or yielded to and the property given up to the owner.<sup>3</sup> A recovery of the value by the owner against the vendee is equivalent to an eviction for the purpose of recovery against the vendor on the warranty of title.<sup>4</sup>

Where the vendee is dispossessed by suit, and has in good faith incurred expenses in defending it, he is entitled to recover these also as an additional item of damages, for the same reasons, and on the same conditions, as when an action is brought on the covenant of warranty in a deed of land, and in other instances of recovery over.<sup>5</sup> By giving the [420]

389; *Marlatt v. Clary*, 20 Ark. 251; *Dabovich v. Emeric*, 12 Cal. 171; *Boyd v. Whitfield*, 19 Ark. 447. This is assumed to be the measure in *Burt v. Dewey*, 40 N. Y. 283.

<sup>1</sup> *Ellis v. Gosney*, 7 J. J. Marsh. 109; *Crittenden v. Posey*, 1 Head, 311; *Anding v. Perkins*, 29 Tex. 348; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Burt v. Dewey*, 31 Barb. 540; *Goss v. Dysant*, 31 Tex. 186; *Granberry v. Hawpe*, 30 id. 409; *Ware v. Weathnall*, 2 McCord, 413; *Rowland v. Shelton*, 25 Ala. 217; *Shattuck v. Green*, 104 Mass. 42; *Eaton v. Mellus*, 7 Gray, 566; *Arthur v. Moss*, 1 Ore. 193; *Atkins v. Hosley*, 3 Thomp. & C. 322; *Woods v. Woods*, 1 Met. (Ky.) 512.

<sup>2</sup> If the failure of title is but partial the damages will bear the same proportion to the whole purchase-money as the value of the part to which the title fails bears to the whole property, estimated at the price paid. *Moorehead v. Davis*, 92 Ind. 303.

In *Crittenden v. Posey*, 1 Head, 311, the vendor had a life estate in the property, which was slaves, for the life of another, and in that case

the consideration paid was permitted to be recovered, but with an abatement of interest during the period of enjoyment; it was computed only from the termination of the life estate.

<sup>3</sup> *O'Brien v. Jones*, 91 N. Y. 93; *Wanser v. Messler*, 29 N. J. L. 256; *Bordwell v. Collie*, 45 N. Y. 594; *S. C.*, 1 Lans. 141; *Joslin v. Caughlin*, 27 Miss. 852; *Sumner v. Gray*, 4 Ark. 467; *Sweetman v. Prince*, 62 Barb. 256; *Randon v. Toby*, 11 How. (U. S.) 493; *McGiffin v. Baird*, 62 N. Y. 329; *Burt v. Dewey*, 40 id. 283; *Brown v. Smith*, 5 How. (Miss.) 387; *Patrick v. Swinney*, 5 Bush, 421; *Ogburn v. Ogburn*, 3 Port. 126; *Conner v. Eddy*, 25 Mo. 72; *Case v. Hall*, 24 Wend. 102; *Richardson v. McFadden*, 13 Tex. 278; *Dent v. McGrath*, 3 Bush, 174; *Sehuchardt v. Allens*, 1 Wall. 359. See *Grose v. Hennessey*, 13 Allen, 389.

<sup>4</sup> *Bordwell v. Collie*, 1 Lans. 141; 45 N. Y. 494; *Allen v. Roundtree*, 1 Spear, 76; *Hynson v. Dunn*, 5 Ark. 395; *Sumner v. Gray*, 4 Ark. 467.

<sup>5</sup> *Thurston v. Spratt*, 52 Me. 202; *Armstrong v. Percy*, 5 Wend. 535;

vendor seasonable notice to defend the suit brought by the owner for the property he is so far made a party that, whether he responds to the notice and defends or not, the judgment is conclusive against him in favor of his vendee to the extent to [421] which his rights are tried and adjudicated.<sup>1</sup> The vendor

*Boyd v. Whitfield*, 19 Ark. 447. In the last case the vendor lived in Virginia, and after his death his administrator also. The securities for the purchase-money were in the hands of an attorney in Kansas for collection. He had been attorney for the vendor, and, after his death was such for the administrator for the purpose of such collection. This attorney was notified of the suit, and the nature of it, for the assertion of the paramount title, and requested to attend to it in behalf of the vendor. The attorney, being unable to attend court, said he would request his partner to do so, and he did assist in the defense. Testimony was taken in Virginia, and it was inferred by the court that the vendor's administrator in that manner obtained notice of the suit, and the object of it, as he was present at the taking of the depositions, and the record was held conclusive against him. The property was slaves, and in the action upon the warranty the court gave the plaintiff their value, and the amount of hire he had been adjudged to pay the true owner, with interest, "etc.," which, perhaps, refers to the costs and expenses of defending the title.

<sup>1</sup> *Davis v. Wilborne*, 1 Hill (S. C.), 27; *Pickett v. Ford*, 4 How. (Miss.) 246; *Barney v. Dewey*, 13 Johns. 225; *Blasdale v. Babcock*, 1 id. 517; *Brewster v. Countryman*, 12 Wend. 450; *Minor v. Clark*, 15 id. 427; *Middleton v. Thompson*, 1 Spear, 67; *Train v. Gold*, 5 Pick. 380; *Ives v. Niles*, 5 Watts, 325; *Collingwood v. Irwin*, 3 id. 310; *Eldridge v. Wad-*

*leigh*, 12 Me. 371; *Marlatt v. Clary*, 20 Ark. 251; *Myers v. Smith*, 27 Md. 91.

This was so held in *Armstrong v. Percy*, 5 Wend. 535. In August, 1825, the defendant had sold a horse to the plaintiff for \$140. In March, 1827, the plaintiff sold the horse, together with another, to M., and took his notes for \$225. In May following, the horse bought of defendant was taken from M. by G. by replevin. A claim for property was interposed — the plaintiff and defendant in this action attended on the inquiry before the sheriff,—the jury found the property to be in G., and defendant expressed his satisfaction with the finding. The replevin was prosecuted to judgment. G. recovered \$72.32 for damages, and \$33.95 costs, which sums, together with \$19.50, the costs of the defense, were paid by M. A. settled with M. by giving up his notes for \$225 and paying him \$20 in cash, and claimed of the referees a report in his favor for the amount of the original consideration paid P. and for the damages and costs recovered against and paid by M., which he had subsequently paid to M. in the manner above stated. Referees report \$275. *Marcy, J.*: "Where the action is on the warranty of title, the damages which naturally result to the purchaser are the value of the article which he loses by the failure of the title, or the price he has paid for it. In the cases of *Curtis v. Han-nay*, 3 Esp. 82, and *Caswell v. Coan*, 1 Taunt. 566, no special damages were set forth in the declaration; the

is bound to protect the vendee from all actions arising from circumstances anterior to the sale of which the cause or germ existed at the time thereof: the debts chargeable on the thing sold, revenue duties to which the goods are liable, or

measure of damages, therefore, in those cases was the price paid for the article; but in the case of *Lewis v. Peake*, 7 Taunt. 152, the declaration assigned as special damages, occasioned by the breach of the warranty, that the plaintiff, confiding in the defendant's warranty, resold the horse with warranty, and was thereby subjected to pay £88 as costs besides the price of the horse. Having given notice to the defendant that he was prosecuted on his warranty, and offered him the option to defend (which was not accepted), the plaintiff was allowed to recover, in addition to the price of the horse, the costs which he was subjected to pay. The principle of that case is probably correct; but it may well be doubted whether the plaintiff here has brought himself within it. We are not furnished with the declaration, and may, therefore, presume that it is so framed as to allow the plaintiff to recover such special damages as by law he could, in any form of declaring, be entitled to recover. If the plaintiff was liable for the costs incurred in testing the title to the horse, or could have been made liable, and has, in fact, paid them, he may recover them of the defendant. If he has paid them without being under a legal liability to do so, it appears to me he had no just right to have them allowed to him in this cause. The extent of the plaintiff's right to damages could not be conclusively settled by the sum which he agreed to allow, or had actually paid M., but by the amount that M. could have recovered against him. What sum could M. have recovered? Cer-

tainly not more than the price paid for the horse when purchased of the plaintiff, and the costs of the suit in which the title was tested. The fact that \$72.32 were allowed to the owners for damages proves that the horse had become deteriorated in the hands of M., and, if so, he could not have recovered of the plaintiff the damages and costs which the owners recovered against him, and the full value of the horse before the deterioration or at the time of his purchase. The damages must be allowed in part or wholly for the use of the horse; and as the plaintiff or M. must have had the benefit of that use, the defendant could not be legally charged therewith. The referees should have arrived at the amount which the plaintiff was entitled to recover by allowing him the price paid to the defendant for the horse and interest thereon, together with the costs which he became liable to pay to the true owners in their suit to establish their title. . . . I presume that the referees considered the costs paid by M. to his own attorney as an item to be taken into the calculation, but I know of no authority for doing so. In the case of *Lewis v. Peake* the plaintiff was permitted to include as an item in the amount of damages the costs recovered against him on his warranty at the resale of the horse. In the case of *Blasdale v. Babcock*, 1 Johns. 517, which was an action on an implied warranty as to the title of a horse, the amount that had been recovered against the plaintiff by the owner of the horse was allowed to be the measure of his damages against the



such defects in the vendor's title as form a *labes realis*. Thus, if rent be due at the time of the sale, the vendor is liable on his implied warranty of title if the property sold be afterwards lawfully seized and taken by the landlord to pay such rent.<sup>1</sup> This warranty extends to and protects against a prior lien as well as an adverse title. So where one sold property, and took a note for the price, the purchaser, finding a lien [422] upon it at the time of the sale, paid it, it was held that the law presumed the payment to have been made at the request of the vendor, and that it was valid.<sup>2</sup> Where the adverse owner has recovered the value instead of the property itself, and the vendor has had the requisite notice to defend the suit in which such recovery was had, he is liable to his vendee for the amount of that judgment both as to damages and costs. The same rule applies to the original vendor who warrants property when his vendee has sold it with a like warranty and judgment has been recovered against him by the sub-vendee.<sup>3</sup>

§ 670. **Damages for breach of warranty as to quantity or quality.** The general rule of damages for breach of warranty as to quantity or quality is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty.<sup>4</sup> This rule

defendant. The expenses of Blasdale in defending the suit against him were not allowed to him as damages against Babcock."

<sup>1</sup> Myers v. Smith, 37 Md. 91.

<sup>2</sup> Crowell v. Simpson, 7 Jones' L. 285; Dresser v. Ainsworth, 9 Barb. 619.

<sup>3</sup> Hammond v. Bussey, 20 Q. B. Div. 79.

<sup>4</sup> Hege v. Newsom, 96 Ind. 426; Jackson v. Mott, 76 Iowa, 263; J. I. Case Threshing M. Co. v. Haven, 65 id. 359; Weybrich v. Harris, 31 Kan. 92; Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373; Wickes Brothers v. Swift Electric Light Co., 70 Mich. 322; Birdsall v. Carter, 11 Neb. 143; Willingham v. Hooven, 74 Ga. 233; Means v. Means, 88 Ind. 196;

Blacker v. Slown, 114 id. 322; Deutsch v. Pratt, 149 Mass. 415; Merrick v. Wiltse, 37 Minn. 41; Young v. Filley, 19 Neb. 543; Bach v. Levy, 101 N. Y. 511; Marsh v. McPherson, 105 U. S. 709; McMullen v. Williams, 5 Ont. App. 518; Nye v. Iowa City Alcohol Works, 51 Iowa, 129; Snow v. Schomacker Manuf. Co., 69 Ala. 111; Sinker v. Diggins, 76 Mich. 557; Birdsall Co. v. Palmer, 74 Md. 201; Houghton v. Carpenter, 40 Vt. 588; Perrine v. Serrell, 30 N. J. L. 454; Roberts v. Fleming, 31 Ala. 683; Buford v. Gould, 35 id. 265; Rutan v. Ludlam, 29 N. J. L. 398; Allen v. Anderson, 3 Humph. 581; Scranton v. Mechanics' T. Co., 37 Conn. 130; Richardson v. Mason, 53 Barb. 601; Tuckwell v. Lambert, 5 Cush. 23;

is not affected by the fact that the vendee has sold the property at an increased price,<sup>1</sup> or paid for it in advance of its delivery.<sup>2</sup> The difference between the value of the whole property purchased, where only a small portion of it is inferior to that required by the contract, and not merely the difference between the price paid for the defective portion as a part of the lot and its actual value, is the measure of the seller's liability.<sup>3</sup> If the article purchased has been used in manufacturing, the cost of the labor and the waste of the material resulting from its defects, with interest from the commencement of the suit, are elements of damage.<sup>4</sup> There is not a total failure

Wells v. Selwood, 61 Barb. 238; Comstock v. Hutchinson, 10 Barb. 211; Voorhees v. Earl, 2 Hill, 288; Pritchard v. Fox, 4 Jones' L. 140; Clark v. Neufville, 46 Ga. 261; Morse v. Hutchins, 102 Mass. 439; Foster v. Rodgers, 27 Ala. 602; Cary v. Gruman, 4 Hill, 625; Tuttle v. Brown, 4 Gray, 457; Reggio v. Braggiotti, 7 Cush. 166; Van Valkenburgh v. Evertson, 13 Wend. 76; Decker v. Myers, 31 How. Pr. 372; Marshall v. Wood, 16 Ala. 806; Marshall v. Gantt, 15 id. 682; Scranton v. Tilley, 16 Tex. 183; Anderson v. Duffield, 8 id. 237; Williamson v. Conday, 3 Ired. L. 349; Seibles v. Blackwell, 1 McMull. 56; Badget v. Broughton, 1 Ga. 591; Sharon v. Mosher, 17 Barb. 518; Prentice v. Dike, 6 Duer, 220; Connor v. Dempsey, 49 N. Y. 665; Hook v. Stovall, 30 Ga. 418; Lane v. Lantz, 27 Md. 211; Hoe v. Sanborn, 35 How. Pr. 197; Anding v. Perkins, 29 Tex. 348; Williamson v. Dillon, 1 Harr. & G. 444; Thornton v. Thompson, 4 Gratt. 121; Burton v. Young, 5 Harr. (Del.) 233; Brown v. Sayles, 27 Vt. 227; Smith v. Cozart, 2 Head, 526; Converse v. Burrows, 2 Minn. 229; Roberts v. Carter, 28 Barb. 462; Whitmore v. South Boston Iron Co., 2 Allen, 52; Edwards v. Collson, 5 Lans. 324.

A vessel was warranted to be of a

certain class; the vendor promised to insure her for a designated sum. The warranty was not true and the insurance could not be obtained. After a total loss it was held that the vendee's damage was not the amount for which the vessel was to be insured, but the sum it would have cost to have made her of the warranted class. *La Roche v. O'Hagan*, 1 Ont. 300.

<sup>1</sup> *Brown v. Bigelow*, 10 Allen, 242; *Texada v. Camp, Walk.* (Miss.) 150; *Hunt v. Van Deusen*, 42 Hun, 392.

<sup>2</sup> *Loder v. Kekule*, 3 C. B. (N. S.) 128.

<sup>3</sup> *Deutsch v. Pratt*, 149 Mass. 415.

<sup>4</sup> *Bagley v. Cleveland Rolling Mill Co.*, 22 Blatch. 342; 21 Fed. Rep. 159.

In *Wait v. Borne*, 123 N. Y. 592, it is held that if the manufactured article has been sold by the warrantee under circumstances which leave no liability upon him to his vendee, the measure of recovery against the warrantor is the difference between the price actually received for it and its value as it would have been but for the defect in the quality of the ingredient which went into such article. This was ruled on the assumption that the price received was at least equal to the actual value of the article sold, in which case it would be conclusive evidence of value.

of consideration if the property retained by the purchaser has some value for any purpose, though it is valueless for the purpose for which it was bought.<sup>1</sup> The price paid for an article is in many jurisdictions deemed the best evidence of its value between the parties at the time of the purchase, and is pre-[423]ferred to any other evidence;<sup>2</sup> but in others it is not treated as exclusive of the test of value; — only as admissible evidence tending to show value.<sup>3</sup> In some states the damages

<sup>1</sup> *Brown v. Weldon*, 99 Mo. 564; 27 Mo. App. 251.

<sup>2</sup> *South Covington, etc. Ry. Co. v. Gest*, 34 Fed. Rep. 628; *Clark v. Neufville*, 46 Ga. 261; *Marshall v. Wood*, 16 Ala. 806; *Scranton v. Tilley*, 16 Tex. 183; *Badget v. Broughton*, 1 Ga. 591; *Hook v. Stovall*, 30 Ga. 418; *Thornton v. Thompson*, 4 Gratt. 121; *Stout v. Jackson*, 2 Rand. 132; *Threlkeld v. Fitzhugh*, 2 Leigh, 451.

<sup>3</sup> *Hege v. Newsom*, 96 Ind. 426; *Houghton v. Carpenter*, 40 Vt. 588; *Cary v. Gruman*, 4 Hill, 625; *Lane v. Lantz*, 27 Md. 211; *Gilpin v. Consequa*, 3 Wash. C. C. 184; *Anding v. Perkins*, 39 Tex. 348.

In *Reggio v. Braggiotti*, 7 Cush. 166, Shaw, C. J., said: "*Prima facie*, the price first paid for the article is good evidence of its value in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country the established rule in relation to damages in such actions is that the plaintiff may recover what he can show that he has actually lost. A subsequent sale by the vendee of the article warranted is evidence of its value to him."

In *Morse v. Hutchins*, 102 Mass. 440, the court say: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to

pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken his contract at the expense of the party who was ready to abide by the terms of the contract."

In *Rutan v. Ludlam*, 29 N. J. L. 398, R. sold to L. a horse, for which L. conveyed to him a house and lot and gave him a note for \$25. In an action against R. for a false warranty of the horse, it was held that evidence of the value of the house and lot was inadmissible; that the only question was the difference in value between a sound horse and an unsound one.

In *Comstock v. Hutchinson*, 10 Barb. 211, a charge to the jury that the measure of damages was the difference between the price paid for the horse and the amount he realized on a resale was held erroneous; and the same in *Cary v. Gruman*, 4 Hill, 625. See *Foster v. Rodgers*, 27 Ala. 602; *Tuttle v. Brown*, 4 Gray, 457.

In an action by the vendor for the price of goods (cigars), the defendant sought to recoup for damages done to the property after the sale and before delivery; it was held to devolve on him to prove that the injury was done during such period; and that he must prove the actual damage without reference to the price paid at

are ascertained, where the sale is for cash, by the difference between the price paid for the property and its value.<sup>1</sup> This rule is rested on the principle that the purchaser is entitled to the benefit of his bargain, if he has bought at a low price, which he would lose if his recovery was limited to the amount paid; the same consideration applies to the defendant if he has made a good sale. But in Illinois this measure of damages does not govern when there has been an exchange of property — then the general rule as stated at the beginning of this section applies.<sup>2</sup>

§ 671. **Same subject.** The rule of damages just stated, like all general rules, is intended for ordinary cases of the class to which it applies, and where it will afford to the injured party full compensation for his actual loss. It often happens, however, that the delivery and acceptance of property which is not conformable to the contract imposes upon the vendee trouble and expense, which add to the loss for which compensation may be recovered under that rule, which, if it were applied arbitrarily, excluding all other items, would in many instances fail to give adequate redress. As the paramount principle is to give compensation commensurate with the loss or injury, the rule on the subject of warranties is always stated, when the case requires it, so as to include inter- [424] est if the price has been paid, and any expense or other special damages naturally and proximately resulting from the breach.<sup>3</sup> Thus, where an article was sold as opium, the court

auction; that it was erroneous to allow him the difference in value between the price at which he bought them at auction and the value when delivered. *Gerard v. Prouty*, 34 Barb. 454.

<sup>1</sup> *West Republic Mining Co. v. Jones*, 108 Pa. St. 55; *Crabtree v. Kile*, 21 Ill. 180; *Callender I. & W. Co. v. Badger*, 30 Ill. App. 314; *Bump v. Cooper*, 19 Ore. 81. Compare *Courtney v. Boswell*, 65 Mo. 96, and *Brown v. Welden*, 99 id. 564.

<sup>2</sup> *Wallace v. Wren*, 32 Ill. 146.

<sup>3</sup> *New York & C. Mining Co. v. Fraser*, 130 U. S. 611, 622; *Union*

*Bank v. Blanchard*, 65 N. H. 21; *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Joplin Water Co. v. Pathe*, 41 Mo. App. 285; *Aultman v. Case*, 68 Wis. 612; *Hambrick v. Wilkins*, 65 Miss. 631; *Halstead L. Co. v. Sutton*, 46 Kan. 192; *Sinker v. Diggins*, 76 Mich. 557; *Swain v. Schieffelin*, 31 N. E. Rep. 1025 (N. Y.); *Roberts v. Fleming*, 31 Ala. 683; *Burford v. Gould*, 35 id. 265; *Perrine v. Serrell*, 30 N. J. L. 454; *McKay v. Lane*, 5 Fla. 268; *Foster v. Rodgers*, 27 Ala. 602; *Reggio v. Braggiotti*, 7 Cush. 166; *Marshall v. Wood*, 16 Ala. 806; *Badgett v. Broughton*, 1 Ga. 591;



held there was an implied warranty of genuineness; and there being a breach of it, and the vendee having resold with a like warranty, and judgment recovered against him for breach of it, the sum paid on this judgment was *prima facie* the amount he was entitled to recover against his vendor; also, that if he gave the latter notice of the commencement of that suit, and requested him to defend it, the plaintiff might, likewise, recover his taxable costs incurred therein; but, following the Massachusetts rule, the attorney fees paid for the defense of such suit were not allowed.<sup>1</sup> And where it was provided that if a warranted machine did not work properly the purchaser's negotiable note should be returned upon the delivery of the machine to the vendor, and the vendee complied with the condition, but the vendor did not return the note, but indorsed it before it was due to a third person under circumstances which gave the maker some cause to believe that the transfer was not *bona fide*, the vendor was held responsible for the attorneys' fees incurred in defense of a suit thereon.<sup>2</sup>

In an action for the breach of warranty on the sale of a mare, the representation made to the plaintiff that she was perfectly gentle and kind was false. The action was for this representation, and it appeared that within two days after

Sharon v. Mosher, 17 Barb. 518; Prentice v. Dike, 6 Duer, 220; Seibles v. Blackwell, 1 McMull. 56.

In Clark v. Neufville, 46 Ga. 264, an action for breach of warranty of quality in the sale of goods, the court say the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule excluding indirect and speculative damages. Thompson v. Bertrand, 23 Ark. 730; Tatum v. Mohr, 21 id. 349; Murray v. Meredith, 25 id. 164.

In Short v. Matteson, 81 Iowa, 638, there was a breach of warranty concerning the colt-getting qualities of a

stallion sold for breeding purposes. The vendee was entitled to recover the difference between the real value of the horse and what his value would have been if the warranty were not false, and also the reasonable costs and expenses incurred for advertising, keeping and standing the horse for breeding purposes prior to the time his real qualities became known.

Interest is not recoverable in New York. White v. Miller, 78 N. Y. 393; Riss v. Messmore, 58 N. Y. Super. Ct. 23.

<sup>1</sup> Reggio v. Braggiotti, 7 Cush. 166; Randall v. Raper, E., B. & E. 84; Hammond v. Bussey, 20 Q. B. Div. 79.

<sup>2</sup> Osborne v. Ehrhard, 37 Kan. 413.

the sale and purchase the plaintiff attempted to drive the mare before a buggy, when she commenced running and kicking, and the buggy was broken; the plaintiff to save himself sprang to the ground and thereby broke one of his legs; it was held admissible to prove the nature and extent and [425] permanent character of the injury to his leg; the length of time he was confined to his house, and the damage done to his buggy; that it should be left to the jury to say, as a question of fact, whether such injuries resulted from the viciousness of the mare and were the probable and natural consequences of the fraud practiced by the defendant.<sup>1</sup> Where slaves were purchased as sound, and proved to be unsound or diseased, reasonable charges for care and attention and medical aid were allowed as damages.<sup>2</sup> And the same rule applies to other property.<sup>3</sup> In such cases the vendee must exert himself with diligence and good faith to effect a cure, and thus prevent further damage.<sup>4</sup>

Where a contract is made by one to furnish to another a specific article of a designated description, to be used for a particular purpose, or for use at another place, and the destination, purpose and use are known to him who agrees to furnish it, and the article furnished is defective for the purpose, and not according to the contract, the damages occasioned by reason of such defects, with reference to the purpose and place, are direct and recoverable. The measure is the difference between the value of the article received, and of that contracted for, at the place and for the purpose contemplated.<sup>5</sup>

<sup>1</sup> Sharon v. Mosher, 17 Barb. 518; Allen v. Truesdell, 135 Mass. 75.

In Rich v. Smith, 34 Hun, 136, the warranty that a horse was "good, gentle and kind" to the extent of being a good family horse was considered general as to his qualities only—not as special for any particular purpose. Injuries sustained by the purchaser in consequence of the animal's running away and colliding with a vehicle were remote and accidental.

<sup>2</sup> Roberts v. Fleming, 31 Ala. 683; Marshall v. Wood, 16 Ala. 806;

Kornegay v. White, 10 id. 255; Willis v. Dudley, id. 933; Stoudenmeier v. Williamson, 29 id. 558; Worthly v. Patterson, 20 id. 172; Gingles v. Caldwell, 21 id. 444; Buford v. Gould, 35 id. 265; Hogan v. Thorington, 8 Port. 428.

<sup>3</sup> Penny v. Andrus, 41 Vt. 631; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29 (expense of testing goods, insurance, freight and cartage).

<sup>4</sup> Id.

<sup>5</sup> Thorne v. McVeagh, 75 Ill. 81; Beeman v. Banta, 118 N. Y. 538 (see

Where the contract is made, to the knowledge of the vendor, for the purpose of shipping the article purchased to a foreign

vol. 1, § 50); *Hammar Paint Co. v. Glover*, 47 Kan. 15; *Swain v. Schiefelin*, 31 N. E. Rep. 1025 (N. Y.); *Passinger v. Thorburn*, 34 N. Y. 634; *Van Wyck v. Allen*, 69 id. 61; *White v. Miller*, 78 id. 393; *Converse v. Burrows*, 2 Minn. 229. In the last case cited the trial court gave an instruction to the jury embodying a legal proposition substantially as stated in the text, which on appeal was approved. The case is not a novel one, but the principle discussed in the opinion is of great practical importance, and will justify a full quotation. *Atwater, J.*, said: "Had there been nothing said between the parties to this contract as to the place where the pork contracted for was to be used, there seems to be no dispute but that the correct rule of damages would have been the difference in the value of the article contracted for and that of the article received at the place of delivery; but the case at bar forms an exception to this general rule. The plaintiff designed this pork for a particular place and purpose, of which fact he notified the defendants at the time of the contract. The defendants therefore entered into the contract in view of these facts, and incurred the obligations imposed by the law in such cases. What were these obligations? In our view, to pay the difference between the value of the pork, as such value was actually found in its damaged state at Fort Ridgeley, and the market value of the quality of pork contracted for at the same place. The correct rule of damages in this case must be determined from the language adopted in the complaint, which purports to state the substance of the contract in refer-

ence to the place of destination and use of the pork. The only clause in the complaint referring to this point reads as follows: 'The said plaintiff further shows to the court that the said pork was to be furnished to the plaintiff for supplies for Fort Ridgeley, in the territory of Minnesota, which plaintiff had contracted to supply, which fact was well known to said defendants.' Now had the complaint simply stated that the pork was destined for use at Fort Ridgeley, or for the market at Fort Ridgeley, and that the defendant had notice thereof, we presume there would have been little question but that the instruction of the court to the jury would have been correct. The case would have fallen within the rule laid down in *Bridge v. Wain*, 1 Stark. 504, a case which seems to be quoted with approbation in *Cary v. Gruman*, 4 Hill, 625, as well as in *Hargous v. Ablon*, 5 Hill, 472. The general rule of damages for breach of warranty on a sale of personal property, as above stated, is the difference between the article sold, in its defective condition, and the market value of the article at the place where it was to be used, in the condition represented by the vendor. The reason of this rule does not seem to be based upon the fact that such measure of damages would always restore the vendee to what he had lost by the breach of warranty, for in many cases this would not be true; but rather upon grounds of public policy, it being manifestly more for the public interest that some rule should be established in such cases, rather than leave each individual case to be governed by its own particular circumstances. Hence, parties entering into

country, and he delivers one inferior in quality to that contracted for, and that fact is not ascertainable until it has

contracts of this kind are aware of their rights and liabilities under a breach of contract by either party; and the exception to the rule in the case above referred to is founded on the same reason and is in harmony with it, the only difference being that the rule of damages is made to depend on the market value of the article at the place where it is to be used, rather than the value at the place where it is purchased; and no good reason can be offered why the rule should be otherwise. If the general rule be not based upon the principle of restoring the party to what he has lost by the breach of contract, it is difficult to perceive why the exception should be based upon such principle. For the parties sustain the same relation to each other and the subject-matter, save that in the latter case the article is purchased for a particular market, of which the vendor is apprised, and it is manifest justice that the vendee should be made whole in that market. And in the eye of the law he is made whole by receiving the difference between the actual value of the article in its damaged condition, and its real value in the condition required by the contract at the place where the article was to be used. But it is claimed that the allegations of the complaint extend the contract made between the parties, so that in case of a breach on the part of the defendants they became liable for the difference, not between the market value of such pork at Fort Ridgeley, as was called for by the contract, and the inferior article furnished by them, but for the difference in value between such article and the contract price between the plaintiff and the Fort.

“Let us look at the allegation, and see if this view can be sustained. It will be observed that it does not appear from the pleadings what the contract was between the plaintiff and the party with whom he contracted at Fort Ridgeley; nor that there was any stipulated price for the pork. Much less does it appear that the plaintiff, at the time he contracted with the defendants for the purchase of the pork, informed them that he had contracted with the Fort at any particular price, nor, if so, at what price. In the absence of any agreement, therefore, on the subject, the presumption would be that the plaintiff had agreed to furnish the pork at current rates at the place of delivery (the Fort). But whatever his agreement may have been, it does not appear that the defendants had any reference to it, or were influenced by it, in entering into their contract. They did not agree to fill the contract of the plaintiff, nor does it appear that they knew what his contract was. They knew only that he had a contract to fill at that place; and the fact that they were aware that the pork was to be used by the plaintiff at Fort Ridgeley makes the case an exception to the general rule which would govern damages on breach of warranty. And to bring the defendants within the exception, it was important that they should know in reference to the plaintiff's contract, so far as the place was concerned. For the degree of care and diligence which they might exercise to fill their contract might be influenced by such knowledge. The fact that the pork was to be transported to a considerable distance during the summer season might lead them to exercise



reached its destination, the purchaser may sell it there for the best price obtainable, and the difference between that and the

more care in its selection and preparation than they otherwise would have done. It therefore becomes important to the plaintiff, if he would bring the defendants within the exception to the general rule of damages, that he should bring home to them the knowledge that the pork was to be used at a certain place; and if he would go further than this, and make the defendants responsible for the loss he has sustained on the particular contract, he must at least show that the defendants knew that the contract was to fill his own, or to make him whole for any failure to do so. The object of the court should be to apply the rule of law to the contract between the parties, if that contract can be ascertained. We are satisfied that the defendants entered into the contract with the plaintiff with the knowledge of the place where the pork was to be used by the plaintiff. But we are not satisfied, nor is there anything in the case to show, that the defendants, in making their contract, took into account in any manner the price the plaintiff was to receive for his pork; or that they ever even knew what price he was to receive. In such case we certainly can see no good reason why either the defendants or plaintiff should now claim any benefit from a consideration which never entered into the original contract. Suppose the plaintiff contracted to sell his pork at the Fort for \$100 per barrel, should he be permitted to recover from the defendants the difference between that sum and the actual value of the pork per barrel at the Fort in its damaged condition? Manifestly, it would not be just that he should

do so, unless the defendants had expressly agreed to pay such difference.

“A law which should recognize such a measure of damages in such cases would be highly inequitable and work great injustice. If such was the rule, as has been justly observed, it would open the door to unfair dealing, and a fraudulent inflation of price by the vendee, with a view to charge the vendor or guarantor; for if the vendor was to be made liable for the loss of a particular trade which the vendee might have made with reference to the subject-matter of the sale, the particulars of such trade, especially as to price, would be of the highest consequence to the vendor, and would form a principal element in, and become the very essence and basis of, the original transaction, instead of being considered of such little moment as not even to be mentioned between the parties. Had the contract between the plaintiff and the defendants in the case at bar been in fact made with reference to the price at which the plaintiff resold the pork, as well as the place where it was to be used, that fact should have been averred by the defendants in their answer, if they would avail themselves of any advantages from it. If the rule in this case be that the plaintiff is entitled to recover from the defendants such sum as he has lost by their breach of warranty, at the place where the pork was destined to be used, then the proposition must be true that the loss of a particular bargain, on resale of the warranted article, must be the rule of damages on breach of warranty; but the authorities are directly to the contrary of this proposition. In

market price of the article contracted for, with the necessary expenses incurred by him, will be the damages.<sup>1</sup>

§ 672. **Same subject.** The cases reported show a [426] great variety of illustrations of the rule that the damages are the difference between the actual value of the property and what its value would have been if conformable to the [427] warranty. The special value to the vendee for a particular use will be taken into account, if known to the vendor at the time of the sale, and he expressly or by implication un- [428] dertook to furnish goods suitable for that use. The principle seems to be settled, that when the manufacturer of an article sells it for a particular purpose, the purchaser making [429] known to him at the time the purpose for which he buys it, the seller impliedly warrants it fit and proper for such purpose and free from secret or latent defects.<sup>2</sup> In *Brown v. Sayles*<sup>3</sup> it was held that when an article is to be manufactured to order and nothing is said as to the quality of the material to be used, it is implied that it shall at least be of an ordinary quality. The acceptance of an article so manufactured is not binding and conclusive upon the purchaser, if the material was

*Clare v. Maynard*, 7 C. & P. 741, it appears that the plaintiff gave \$45 for a horse, and had sold him for \$55, with warranty, but was obliged to take him back. This, *per se*, was not allowed as a ground for recovering the \$10 difference, the court saying it was the mere loss of an accidental bargain. The same principle is recognized in *Voorhees v. Earl*, 2 Hill, 288; *Clare v. Maynard*, 6 Ad. & E. 19; *Hargous v. Ablon*, 5 Hill, 472; *Phillips' Ev.*, vol. 5, p. 105; *Greenlf. on Ev.*, vol. 2, p. 273; *Sedg. on Dam.* 295."

See *Bridge v. Wain*, 1 Stark. 504. In this case scarlet cuttings were purchased for sale in China. In an action for breach of the implied warranty that the goods were such, Lord Ellenborough instructed the jury to consider the effect of their being of no use or value in China. "I am decidedly of the opinion,"

said his lordship, "that by value is to be understood the value which the plaintiff would have received had the defendant faithfully performed his contract."

As to the necessity that the vendor be informed of the price in the vendee's contract for resale, see vol. 1, § 52; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Elbinger Actien Gesellschaft v. Armstrong*, L. R. 9 C. P. 473; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487.

<sup>1</sup> *Camden Consolidated Oil Co. v. Schlens*, 59 Md. 31, 45.

<sup>2</sup> *Pease v. Sabin*, 38 Vt. 432; *Edwards v. Collson*, 5 Lans. 324; *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Merrill v. Nightingale*, 29 Wis. 247; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Walton v. Cody*, 1 Wis. 420.

<sup>3</sup> 27 Vt. 227.

defective, and the defect was not known nor observable on careful inspection. After such an acceptance of a defective article the purchaser will only be liable for its value, not for the contract price. Dealers who do not make or grow what they sell may, by the circumstances of the sale, incur a like obligation. They must agree that what they sell is suitable for the intended use; and the purchaser must trust to the judgment and skill of the vendor.<sup>1</sup> In such cases, and also where there is an express warranty, the value of the property purchased to the vendee includes those gains which would, with the requisite certainty, have accrued to him if the vendor had faithfully performed his contract, and exemption from those expenses and losses which naturally and proximately result from his failure to do so. Thus a warranty of a steam-engine, as having a certain capacity for work, and as sound and in good order, if untrue, will entitle the vendee to recover the [430] difference between the actual value and what its value would have been had the engine been conformable to the warranty.<sup>2</sup> And the vendee may show this difference of value by proof of what it would cost to replace the machinery furnished with such as was demanded by the contract.<sup>3</sup> The sale of a rope for use on the vendee's crane was held to import a warranty of fitness, and the vendor was liable for a cask of wine lost by the breaking of the rope;<sup>4</sup> and in another case for the value of an anchor lost by the breaking of the cable sold for the purpose of holding it;<sup>5</sup> and the vendor of a war-

<sup>1</sup> *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Mason v. Chappell*, 15 Gratt. 572.

<sup>2</sup> *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 36 Vt. 194; *Merrill v. Nightingale*, 39 Wis. 247; *Giffert v. West*, 33 id. 617; *Park v. Morris & T. Co.*, 4 Lans. 103.

<sup>3</sup> *Holmes v. Boydston*, 1 Neb. 346; *Hitchcock v. Hunt*, 28 Conn. 343; *Fisk v. Tank*, 12 Wis. 276; *Benjamin v. Hilliard*, 23 How. (U. S.) 149; *Marsh v. McPherson*, 105 U. S. 709.

<sup>4</sup> *Brown v. Egington*, 2 M. & G. 279.

<sup>5</sup> *Borradaile v. Brunton*, 8 Taunt.

535. The authority of this case was questioned in *Hadley v. Baxendale*, 9 Exch. 341. This criticism is noticed in *Mayne on Dam.* (Wood's ed.) 267, and the remark of *Alderson, B.*, that on the same principle the jury might have given the value of the ship, if it had been lost. This author says: "No doubt the enormity of the damages which would be recoverable in such a case is very startling. But if a chain cable is sold for the express purpose of holding a ship to its anchor, and if, through some defect of it, the ship drifts on shore, it is difficult to see why the damages

ranted lintel which caused the fall of a building in which it was used was liable for the damage.<sup>1</sup> A manufacturer of barrels is liable for the loss of their contents by reason of defects in them.<sup>2</sup> The rental value of a mill which lies idle because of the insufficiency of warranted machinery is an element of damage;<sup>3</sup> as is the cost of making repairs and the wages of men who are kept idle in consequence.<sup>4</sup> The vendor of hay or grain which is to be fed to animals, or which is ordinarily used for that purpose, is liable for injury done to the vendee's animals by a poisonous substance contained therein.<sup>5</sup> A dealer in Paris green sold by mistake to a customer, knowing that he desired it to use on his crop for the purpose of destroying worms which injured it, another substance much in appearance like that applied for. The substance delivered was used on the crop without producing the desired result. The vendor was held liable for the value of the crop as it stood just before it was destroyed, the cost of the article sold, the expense of preparing and applying it, with interest on the money expended, except in so far as the purchaser could, with ordinary care and reasonable expense, have prevented any of these elements of damage.<sup>6</sup> If rags sold as clean, free from infection and fit to be manufactured into paper, are in-

should stop at any smaller amount. When the pole of a carriage broke, in consequence of which the horses became frightened and were injured, the court held that the sale of the pole carried with it an implied warranty that it was reasonably fit for its purposes; and that, as to damages, the proper question to leave to the jury was whether the injury to the horses was or was not a natural consequence of the defect in the pole. *Randall v. Newson*, 2 Q. B. Div. 102. See criticism on this case and that cited in preceding note, in note 7, p. 1516.

<sup>1</sup> *Riss v. Messmore*, 30 N. Y. St. Rep. 250; S. C., 9 N. Y. Supp. 320; 58 N. Y. Super. Ct. 23.

<sup>2</sup> *Poland v. Miller*, 95 Ind. 387.

<sup>3</sup> *Sinker v. Kidder*, 123 Ind. 528;

*Erie City Iron Works v. Barber*, 106 Pa. St. 125.

<sup>4</sup> *Aultman v. Stout*, 15 Neb. 586; *Erie City Iron Works v. Barber*, *supra*; *New York & C. Mining Co. v. Fraser*, 130 U. S. 611, 622.

In the absence of proof of value the legal rate of interest upon the cost may be taken as the fair rental value of a mill. *New York & C. Mining Co. v. Fraser*, *supra*.

Expenses incurred in experimenting with a machine after it has been demonstrated to be defective are not recoverable from the vendor. *Aultman v. Stout*, *supra*.

<sup>5</sup> *French v. Vining*, 102 Mass. 132; *Wilson v. Dunville*, 4 L. R. Ire. 249; S. C., 6 id. 210.

<sup>6</sup> *Jones v. George*, 61 Texas, 345. See vol. 1, § 50.



fectured with the small-pox and cause that disease to break out in the vendee's mill, the elements of damage are the loss of his trade because of the disability of his men and the money expended to support them while they are afflicted with the disease.<sup>1</sup> The vendee may recover compensation for labor, expense or losses sustained in *bona fide* attempts to make a warranted machine produce the results which it was bought and sold for,<sup>2</sup> so far as they were incurred prior to the time he was bound by his contract to return it if it did not fill the warranty,<sup>3</sup> unless such efforts are clearly futile,<sup>4</sup> or the contract limits the liability of the vendor.<sup>5</sup> To make the vendor of a harvesting machine, sold with a warranty of its quality and capacity, and with knowledge that it was purchased for the purpose of harvesting the vendee's grain, liable for damage sustained by the grain on account of the failure of the machine to work, it must appear that it was impracticable to secure the grain by other means, or that the delay in experimenting with the harvester was justified, or that it was contemplated by the parties that such damage would be the result of the breach of the warranty.<sup>6</sup> In the absence of fraud or bad faith the vendor of a safe which is warranted to be "burglar proof" is not liable for damages sustained by the loss of valuables taken therefrom by burglars who broke it open.<sup>7</sup>

<sup>1</sup> Dushane v. Benedict, 120 U. S. 630.

<sup>2</sup> Fox v. Stockton Harvester, etc. Works, 83 Cal. 333; Whitehead & A. Machine Co. v. Ryder, 139 Mass. 366. But in Minnesota, in the absence of fraud, expenses incurred by the purchaser for the medical examination and treatment of a warranted horse are not recoverable. Merrick v. Wiltse, 37 Minn. 41.

<sup>3</sup> Newberry v. Bennett, 38 Fed. Rep. 308.

<sup>4</sup> Draper v. Sweet, 66 Barb. 145; Nye v. Iowa City Alcohol Works, 51 Iowa, 129; Murphy v. McGraw, 74 Mich. 318.

<sup>5</sup> Sycamore Marsh Harvester Manuf. Co. v. Sturm, 13 Neb. 210; McCormick v. Vanatta, 43 Iowa, 389.

<sup>6</sup> Wilson v. Reedy, 32 Minn. 256; Froherich v. Gammon, 28 id. 476. Compare Aultman v. Case, 68 Wis. 612.

<sup>7</sup> Herring v. Skaggs, 62 Ala. 180. It is said in this case that Borradaile v. Brunton and Brown v. Egington, *supra*, carry the principle of liability on the part of a vendor to extreme results. In the latter case "nothing was said, either in the argument of counsel or in the opinions of the judges, on the question of the loss of the wine being too remote to justify a recovery therefor." Distinguishing those and other cases from the one in hand, the court say, by Stone, J., that the injuries in them resulted directly from the known use for which

The uncertainty of the extent to which damages have resulted from the breach of a contract is not ground for refusing the recovery of any. As was said in a late New York case: "When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach."<sup>1</sup> Hence, where an article sold for a known use proves unfit therefor and produces injury to the customers of the vendee, the vendor is liable for the value of the article and for the injury resulting to the vendee from its defects by loss of trade.<sup>2</sup>

§ 673. **Same subject.** Where coal dust was sold and warranted to contain no soft or bituminous coal, and with knowledge that it was intended by the vendee to make brick and that if there was soft coal dust in it its use would ruin the brick, on breach of the warranty it was held that the vendee was not limited in his recovery to the difference between the value of impure and pure dust, but that he might recover all the loss he had actually sustained from the use of the dust in making brick; these damages were clearly such as were in contemplation by the parties.<sup>3</sup> On a sale of onion seed it was warranted to be "good, fresh, and such seed as would [431] grow." There being a breach of warranty, the seed not growing, the vendee was held to be entitled to recover as damages the amount paid for the seed, the value of labor in preparing the ground for it (after deducting the benefit to the land) and in planting it, with interest on the several amounts.<sup>4</sup> In another case where the warranty was that the seed was "early strap-leaved, red-top turnip seed," on a breach because the seed sold was a different turnip seed, it was held that the measure of damages was the difference between the market value of the crop raised and one from the seed ordered.<sup>5</sup>

the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or inaptness for the service required. They were the natural consequence of the falsity of the warranty.

<sup>1</sup> *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205.

<sup>2</sup> *Swain v. Schieffelin*, 31 N. E. Rep. 1025 (N. Y.).

<sup>3</sup> *Milburn v. Belloni*, 39 N. Y. 53; reversing S. C., 34 Barb. 607.

<sup>4</sup> *Ferris v. Comstock*, 33 Conn. 513.

<sup>5</sup> *Wolcott v. Mount*, 36 N. J. L. 262.

Depue, J., said: "Profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract by reason of which the adventure was defeated. For a similar reason the loss of the value of a crop for which the seed had not been sown, the yield of which if planted would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character. In this case the defendant had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes to a purchaser engaged in that business would of itself imply knowledge of the use which was intended sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent on the condition of the weather and season, was [432] removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed." There is no inconsistency between the result here reached and that arrived at in the preceding case, but the language here quoted would exclude the damages allowed if the seed did not grow when planted. In the foregoing quotation the uncertainties of weather and season render the crop, when the seed is not sowed, incapable of estimation; but it is conceded to be otherwise if a different seed is sowed and a crop raised on the ground prepared for the seed ordered. It is to be observed that the contract of sale was not made with reference to the use of the seed on any specified ground. And hence the uncertainties of weather and season might be removed by proof of actual turnip raising in the vicinity, and

the requisite proof would always exist if any turnips were produced in the neighborhood; such proof would entirely harmonize with the principle of the other illustrations of a vessel under charter or engaged in a trade. A similar case to the last arose in New York,<sup>1</sup> and the court held to the same rule of damages, and it has been approved in a still later case.<sup>2</sup> Andrews, J., referring to the preceding case, said: "It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principles. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence and have naturally resulted from the breach."<sup>3</sup> But mere contingent and speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger v. Thorburn* are incapable of being ascertained with reasonable certainty by a jury? The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted under similar cir- [433] cumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind. The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values."<sup>4</sup>

§ 674. *Same subject.* A few months prior to the decision of *White v. Miller* the case of *Van Wyck v. Allen*<sup>5</sup> had been

<sup>1</sup> *Passinger v. Thorburn*, 34 N. Y. 634.

<sup>2</sup> *White v. Miller*, 71 N. Y. 118.

<sup>3</sup> *Masterton v. Mayor, etc.*, 7 Hill, 61; *Griffin v. Colver*, 16 N. Y. 489;

*Messmore v. New York S. & L. Co.*, 40 N. Y. 422.

<sup>4</sup> Citing *Mahon v. New York, etc. R. Co.*, 20 N. Y. 469; *Smith v. Velie*,

60 N. Y. 106.

<sup>5</sup> 69 N. Y. 61.



decided, but it is not referred to in the later case. The instruction given the jury in *Passinger v. Thorburn* was that if the warranty was untrue then "the damages would be the value of the crop of Bristol cabbages such as they should believe would ordinarily have been produced that year, deducting all expenses of raising the crop, and also deducting the product or value of the crop actually raised." In *Van Wyck v. Allen* the question was whether this instruction was sufficiently favorable to the plaintiff. *Folger, J.*, said: "It is urged here as error that the trial court departed from the rule in that case laid down in not directing a deduction from the value of the crop of the cost of producing it: so that we are to assume for the purpose of this case that the decision in *Passinger v. Thorburn* is not erroneous. But it will be observed of that case that it did not undertake to fix the limits of the rule on all sides. There came to this court therein for review a rule of damages laid down at the circuit, to wit: that the plaintiff was entitled to recover the value of a crop which could have been raised from good seed, less the cost of producing the crop, and the value of what was in fact raised. To this holding at the circuit the defendant excepted, but the plaintiff did not; so that there was raised in this court only the question whether the rule was unjust to the defendant: not any question whether the plaintiff could have found fault [434] with its limits. The appellate court could not review it, save to say that it was or was not too large. Whether it might not have been larger was not before the court, so that case is not an authority against the holding now before us. It is a decision which we may not in this case question, that where seeds are sold as, or warranted to be, those of a certain vegetable, and to produce that vegetable, then the vendee, the warranty failing, may recover the value of the reasonably anticipated crop, less the cost of tillage and the value of what was in fact raised. But if he may recover the value of the crop which should be, why, when naught is the product, should the vendee be held to credit the vendor with the lost labor and expenses? That he has expended, in this case, and should be remunerated, if he is to have full compensation. He would have been repaid it out of the profits of the crop had a crop been raised. He will repay it now out of the damages, which

stand in the place of the profits of the crop, if his judgment for them remains unimpaired. If he, having paid it out in futile tillage, is not to have recompense for it, he has lost it once. And if now he is to deduct it from the value of the crop which that tillage should have produced, he loses it twice. The crop, if raised, would have represented to him all that went into it, of time, labor, money, use of land and materials. The avails of the crop would have gone to reimburse each of those. He gets, in his damages, what the avails of the crop would have been, and those damages should go to reimburse each of those items. But if from the damages he deducts them, there are no damages to reimburse them, and he loses them entirely. If there had been any part of a crop raised, the value of that, clearly, should have been deducted.”<sup>1</sup>

In an English case seed potatoes sold with a warranty proved to have been mixed with another variety less valuable. The quantity purchased was twelve tons, from which thirty-five tons were grown. Cave, J., directed the jury that if they thought the purchaser ought to have examined the potatoes before planting them and ascertained their quality, that damages should be given on the basis of the quantity bought; if he acted reasonably in not doing so, then the quantity produced would be the basis upon which to calculate the damages.<sup>2</sup> The vendor of impure clover seed has been held liable for the difference between the value of pure seed and of that sold, and also the difference between the value of the farm before and after the seed sold was sown thereon.<sup>3</sup> The damage to the farm may be shown by proof of the extent to which weeds grew upon it in consequence of the impurity of the seed, the expense, labor and difficulty of removing them and the hinderance to the growth of crops thereon.<sup>4</sup> According to the view of the Tennessee court such damages as were recovered in the foregoing cases are too speculative for allowance.<sup>5</sup> And in Georgia the extent of a recovery where seeds prove worthless is the purchase-money with interest and ex-

<sup>1</sup> See *Page v. Pavey*, 8 C. & P. 769; *Cary v. Gruman*, 4 Hill, 625.

<sup>2</sup> *Wagstaff v. Short Horn Dairy Co.*, 1 Cab. & E. 324 (1884).

<sup>3</sup> *Fox v. Everson*, 27 Hun, 355; *McMullan v. Free*, 13 Ont. 57.

<sup>4</sup> *Fox v. Everson*, *supra*.

<sup>5</sup> *Hurley v. Buchi*, 10 Lea, 346.

penses incurred in preparing the land for, and in planting, the seed, and compensation for any other necessary labor.<sup>1</sup>

§ 675. **Same subject.** Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to buyers who will purchase for the purpose of sowing them, if the warranty is untrue, there seems to be no difference in principle as to the subject of damages between such a sale and one with such warranty where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one [435] buying seed to sell again justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard just mentioned, that is also the measure of his loss as against his vendor.<sup>2</sup>

If animals sold are warranted sound, and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being placed with other stock, the loss not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.<sup>3</sup> If sheep are purchased and sold for the purpose of breeding, and as a result of a contagious disease affecting them there is a deterioration in the lambs dropped soon after their sale, that forms a proper element of damages in an action for the breach of the

<sup>1</sup> *Butler v. Moore*, 68 Ga. 780. The code provides that "remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract."

<sup>2</sup> *Randall v. Raper*, E., B. & E. 84.

<sup>3</sup> *Pinney v. Andrews*, 41 Vt. 631; *Bradley v. Rea*, 14 Allen, 20; *Marsh v. Webber*, 16 Minn. 418; *Brown v. Wood*, 3 Cold. 182; *Faris v. Lewis*, 2 B. Mon. 375; *Rose v. Wallace*, 11

Ind. 112; *Sherrod v. Langdon*, 21 Iowa, 518; *Wintz v. Morrison*, 17 Tex. 372; *Jeffrey v. Bigelow*, 13 Wend. 518; *Weaver v. Penny*, 17 Ill. App. 628; *Joy v. Bitzer*, 77 Iowa, 73, quoting the text; *Smith v. Green*, 1 C. P. Div. 92; *Long v. Clapp*, 15 Neb. 417; *Routh v. Caron*, 64 Tex. 289.

A sale of "good merchantable cattle" means such as are free from a latent disease, and the vendor of those which are not so is liable for the vendee's losses proximately resulting. *Parks v. O'Connor*, 70 Tex. 377. See *Hill v. Ball*, 2 H. & N. 299; *Mullett v. Mason*, L. R. 1 C. P. 559.

warranty.<sup>1</sup> Knowledge of the existence of the disease in the animals sold is not necessary in order that the vendor shall be liable for the consequences of its communication to others where he expressly warrants against that result.<sup>2</sup> And according to some cases the right to recover does not depend upon knowledge in the vendor at the time of sale that the buyer designs to place the animals sold with others.<sup>3</sup> The vendor is liable if he knew that this might be done.<sup>4</sup> A buyer may recover damages for personal injuries which result from selling property with a false warranty. A chemist or druggist may be held liable for such injuries received from deleterious compounds furnished which are unfit for the purpose for which he professed to sell them.<sup>5</sup> A dealer will be liable for like injuries resulting from the explosion of illuminating oils sold with warranty, express or implied, which is untrue.<sup>6</sup> And so will any vendor be held answerable for such injuries from vicious animals, sold with warranty of gentle and docile nature.<sup>7</sup> In such cases there is a negligence which, though free from fraud, involves a serious breach of social duty as well as contract; and when the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be co-extensive with that allowed for compensation in actions for negligence. Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to one injured thereby whether a contract between them be violated by that negligence or not.<sup>8</sup> If the law and a contract impose the same [436] duty the same redress for violation is due by either, and would be accorded unless there should be practical restriction in the form of action necessarily resorted to to obtain that redress.

<sup>1</sup> Broquet v. Tripp, 36 Kan. 700.

<sup>2</sup> McKee v. Jones, 67 Miss. 405; Joy v. Bitzer, 77 Iowa, 73.

<sup>3</sup> Sherrod v. Langdon, 21 Iowa, 518; Packard v. Slack, 32 Vt. 12.

<sup>4</sup> Smith v. Green, 1 C. P. Div. 92.

<sup>5</sup> George v. Skivington, L. R. 5 Exch. 1; Thomas v. Winchester, 6 N. Y. 397; Jones v. George, 56 Tex. 149; S. C., 61 id. 345, fully stated in vol. 1, § 50; Swain v. Schieffelin, 12

N. Y. Supp. 155; S. C., 31 N. E. Rep 1025 (loss of business resulting from poisonous substance in ice cream recovered for). See Longmeid v. Halliday, 6 Eng. L. & Eq. 562.

<sup>6</sup> Miller v. Downer, etc. Co., 104 Mass. 64; Davidson v. Nichols, 11 Allen, 519.

<sup>7</sup> Sharon v. Mosher, 17 Barb. 518.

<sup>8</sup> Longmeid v. Halliday, 6 Eng. L. & Eq. 562.



In *McDonald v. Snelling*,<sup>1</sup> Foster, J., said: "Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he shall be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well-established and ancient doctrine of the common law, and such liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected."<sup>2</sup>

<sup>1</sup> 14 Allen, 290.

<sup>2</sup> In *McGavoch v. Wood*, 1 Sneed, 181, a slave was sold to be taken south or elsewhere for sale or service; and after the journey an action was brought by the vendee against the vendor upon his warranty of soundness; held, there was no rule which would authorize the plaintiff to recover the expenses of the slave on that trip.

In *Gas Light Co. v. Colliday*, 25 Md. 1, it was held that for shutting off gas, and refusing to supply it according to contract, after the pipes and fixtures for that purpose had been put in place in a building used for business purposes, the depreciation of the property for sale or lease, and the expense of restoring the premises to proper condition, divested of the gas pipes, might be taken into account as part of the damages.

In the similar case of *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, which was like the common-law action on the case, the jury was instructed that "plaintiff, if entitled to a verdict, should have such damages as will compensate him for the

pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the defendant's refusal to furnish gas to him." *Payne, J.*, delivering the opinion of the court, said: "It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is clearly not so. The 'inconvenience and annoyance' occasioned directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this, as a punishment for the other party. In actions for a nuisance the damages usually consist almost entirely in inconvenience and annoyance. So also in many other actions of tort. In *Ives v. Humphrey*, 1 E. D. Smith, 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injury sustained by him the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, in-

**§ 676. Defenses to actions for purchase-money.** The [437] vendee cannot resist the collection of the purchase-money, where there is no fraud or warranty, merely because the prop-

sult, invasion of the privacy and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff; and in estimating the amount of such damages all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience.' So in an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damages, as going to show that 'the plaintiff had sustained inconvenience.' *Ward v. Smith*, 11 Price, 19. . . . But the appellant further objects to the admission of evidence to show that it would injure the plaintiff's business to be deprived of gas when other stores were lighted with it. It is said that the object of this was to show that the want of gas would tend to prevent customers from coming to the store, and consequently that the plaintiff lost the profits that he otherwise might have made. And the appellant then relies on a class of authorities in which, both in actions of tort and for breaches of contract, it has been held that anticipated profits could not be recovered as damages. Upon this subject the authorities are full of confusion and uncertainty, and it is very generally conceded that no definite or satisfactory rule can be

extracted from them. *Sedgwick on Dam.*, p. 112; *Cincinnati v. Evans*, 5 Ohio St. 603. But I think it can by no means be said to be established that the profits of a business or of a contract may never be considered in estimating the damages, where one party has been deprived of those profits by the wrong or default of another. On the contrary, I think the opposite conclusion is sustained, and that the tendency of the recent cases is to allow such profits to be recovered as damages where their amount can be shown with reasonable certainty. The question often arises in cases of breach of contract, and there are many authorities which hold that the profits that might have accrued to the injured party on the contract itself, which was broken, may be recovered as damages. *Philadelphia, etc. R. Co. v. Howard*, 13 How. (U. S.) 307, 344; *Masterton v. Mayor*, 7 Hill, 61; *Fox v. Harding*, 7 Cush. 522. These cases confine the profits to be recovered to such as might have been made on the contract the breach of which is complained of. Yet it is very evident that even such profits cannot be arrived at with any absolute certainty, as they frequently depend upon fluctuations in the market, and changes in the price of labor and materials, which may take place while the contract is being performed. Yet, inasmuch as they may be estimated with reasonable certainty, and their loss is the direct result of the wrong complained of, they are allowed to be recovered. And in the case of *Waters v. Towers*, 20 Eng. L. & Eq. 410, the rule was extended so as to include

[438] erty is less valuable than he supposed;<sup>1</sup> nor because of latent defects.<sup>2</sup> But where goods are sold with warranty, which proves untrue, the vendee, when sued for the contract price either on a general count for goods sold and delivered or bargained and sold upon the special contract of sale, or upon a note or other security for the price, may allege the breach of warranty as a defense, and obtain an abatement of damages to the amount he would be entitled to recover for such breach in a cross-action. This defense is allowed under various names — reduction or mitigation of damages, partial fail-  
[439] ure of consideration, discount, or recoupment. It is not universally allowed, but nearly so, not only for breach of warranty, but also for any fraud of the vendor in the sale. The cases cited below fully define and illustrate this defense; and

profits on a collateral contract which the plaintiff had entered into with other parties. The court said: 'If reasonable evidence is given that the amount of profit would have been made as claimed the damages may be asked accordingly. . . . Hadley v. Baxendale, 26 Eng. L. & Eq. 398; Fletcher v. Tayleur, 33 id. 187.' I think the principle fairly to be derived from these cases is, that the profits lost as a direct result of a breach of contract may be recovered as damages, where they are not so conjectural and remote as to be incapable of ascertainment with reasonable certainty. And their reasoning seems entirely applicable to this case. The defendant here knew that if he refused gas to the plaintiff he could get it nowhere else. It stood, therefore, in the same position that the carrier would have been in, in Hadley v. Baxendale, if he had known the plaintiff could have no shaft to his mill until the model was delivered. The defendant, therefore, must be presumed to have contemplated whatever damage would naturally arise from its refusal to fur-

nish the plaintiff with gas. Its obligation to furnish it was, according to the decisions of this court, as clear and imperative as though it had expressly contracted to do it. And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such a business, the experience of the past to serve as a test. And the rule suggested by Jarvis, C. J., in Fletcher v. Tayleur, that the damages should be estimated 'according to the average percentage of mercantile profits,' could readily be applied, and would seem just and reasonable. The cases already referred to seem to me, therefore, applicable here, and to sustain the conclusion that the profits of a business which are necessarily lost by the wrong or default of another may, under some circumstances and with proper restrictions, be considered in estimating the damages for the injury."

<sup>1</sup> Leonard v. Peebles, 30 Ga. 61.

<sup>2</sup> Drew v. Roe, 41 Conn. 41.

for a full exposition of the subject, the reader is referred to the section on "Recoupment and Counter-claim."<sup>1</sup>

<sup>1</sup> Vol. 1, §§ 168-179; *McAllister v. 223*; *Polhemus v. Heiman*, 45 Cal. Reab, 4 Wend. 484; *Reab v. McAllister*, 8 id. 109; *Van Epps v. Harrison*, 5 Hill, 63; *Ward v. Reynolds*, 32 Ala. 384; *Hoe v. Sanborn*, 3 Abb. (N. S.) 189; *Caldwell v. Sawyer*, 30 Ala. 283; *Jemison v. Woodruff*, 34 id. 143; *Davis v. Dickey*, 23 id. 848; *Rotan v. Nichols*, 22 Ark. 244; *Desha v. Robinson*, 17 id. 228; *Plant v. Condit*, 22 id. 454; *Peck v. Farrington*, 9 Wend. 44; *Parker v. Pringle*, 2 Strobb. 249; *Young v. Plumeau*, Harp. 349; *Harmon v. Sanderson*, 6 Sm. & M. 41; *Wheelock v. Pacific P. G. Co.*, 51 Cal. 223; *Huckaber v. Albritton*, 10 Ala. 651; *Simmons v. Cutreer*, 12 Sm. & M. 584; *Otis v. Alderson*, 10 id. 476; *Allaire v. Whitney*, 1 Hill, 484; 1 N. Y. 305; *Luffburrow v. Henderson*, 30 Ga. 482; *Perley v. Balch*, 23 Pick. 282; *Aultman v. Mason*, 83 Ga. 212; *Dayton v. Hooglund*, 39 Ohio St. 671; *Shaw v. Smith*, 45 Kan. 334; *Dr. Harter Medicine Co. v. Hopkins* (Wis.), 53 N. W. Rep. 501. See *McDugald v. McFadgin*, 6 Jones' L. 89; *Henning v. Vanhook*, 8 Humph. 678; *McEntyre v. McEntyre*, 12 Ired. 299.



## CHAPTER XV.

## CONTRACTS FOR SERVICES.

## § 677. Scope of subject.

678. Recovery where wages fixed, and under statute.

679. On *quantum meruit*.

680. Proof of the value of services.

681. A statutory day's work.

682. Recovery for attorney's services.

683. Recovery for broker's services.

684. Various modes of compensating services.

685. Continuation of original contract.

686. Necessity of full performance of entire contract.

687-690. Dispensation in case of inability.

691. Entire and apportionable contracts.

692-694. Wrongful dismissal of employee.

695. Liability of employee for violation of contract.

[440] § 677. **Scope of chapter.** This subject properly includes the contracts not only of servants and laborers, of mechanics and builders, for professional and skilled labor, but also salvage service, agency and many kinds of bailment.

§ 678. **Recovery where wages fixed, and under statute.** Where the contract is express and fixes the amount of compensation due on performance, that stipulated compensation is the measure of damages whether the action is brought on the contract or in general *assumpsit*.<sup>1</sup> If the contract clearly provides that the compensation shall be determined by the employer after the work is performed, his decision is binding in the absence of fraud or bad faith, which will not be inferred from the fact that the value of the services was considerably more than the sum named by him.<sup>2</sup> Where a statute gives

<sup>1</sup> Fells v. Vestvali, 2 Keyes, 152; State v. Hawkins, 28 Mo. 366; Kirk McKinney v. School District, 20 v. Hartman, 63 Pa. St. 97; Balsbaugh Minn. 72; Edwards v. Goldsmith, 16 v. Frazer, 19 id. 95; Ludlow v. Dale, 62 N. Y. 617; Steinburg v. Gebhardt, 41 Mo. 519.

<sup>2</sup> Butler v. Winona Mill Co., 28 Wheat. 237. See Gay v. Botts, 13 Minn. 205. But in Illinois a contract to pay whatever the party performing may charge does not preclude

the owner of logs compensation for driving those owned by another person which are intermingled with his, the right to recover is not affected by a custom which regards such services as gratuitous, nor defeated by the fact that the owner did not know that they were driven. The recovery is to be measured by the value of the labor regardless of the resulting benefit.<sup>1</sup> If a bill is presented for services, the amount claimed therein limits the recovery.<sup>2</sup>

§ 679. **Recovery on quantum meruit.** If the compensation has not been fixed by agreement he who has done work on a hiring for wages may recover so much as the services are reasonably worth, or so much as he deserves.<sup>3</sup> Recovery may be had according to the value of the services, not the benefit the employer derives therefrom.<sup>4</sup> A contract to pay may be inferred from circumstances, without any express agreement;<sup>5</sup> and the price may be tacitly fixed by their indicating a [441] concurrence of the minds of the parties.<sup>6</sup> The duty to pay may be imposed by law under the fiction of an implied promise, where there was neither promise nor intention to pay, as where the performance of service has been procured by fraud.<sup>7</sup> If a father repudiates a contract for service made by his minor son he may claim the value of the services rendered. If the employer has permitted the son to use part of his time for his own purposes its value may be deducted.<sup>8</sup> A promise by the employer is generally implied to make reasonable compensation for services rendered, unless there are circumstances which negative that implication.<sup>9</sup> Where a person renders

the person served from disputing the reasonableness of the charge. The plaintiff may only recover what his services are worth. *Van Arman v. Byington*, 38 Ill. 433.

<sup>1</sup> *Osborne v. C. N. Nelson Lumber Co.*, 33 Minn. 285.

<sup>2</sup> *Daniels v. Wilber*, 60 Ill. 526.

<sup>3</sup> *Coleman v. Simpson*, 2 Dana, 166; *Downing v. Major*, id. 228; *Weston v. Davis*, 24 Me. 374; *Smith v. Davis*, 45 N. H. 566; *Updike v. Tenbroeck*, 32 N. J. L. 105; *Lewis v. Trickey*, 20 Barb. 387; *Bergin v. Wemple*, 30 N. Y. 319; *Ricketts v. Sisson*, 9 Dana,

358; *Erben v. Lorrillard*, 2 Keyes, 567; *Spencer v. Storrs*, 38 Vt. 156.

<sup>4</sup> *Stowe v. Buttrick*, 125 Mass. 449.

<sup>5</sup> *Coleman v. Simpson*, 2 Dana, 166.

<sup>6</sup> *Wilder v. Stanley*, 49 Vt. 105;

*Buck v. Worcester*, 48 id. 2; *Curley v. Jenkins*, 46 id. 721.

<sup>7</sup> *Rumsey v. Northeastern Ry. Co.*, 14 C. B. (N. S.) 641; *Morrison v. Bradley*, 5 Cal. 503.

<sup>8</sup> *Sherlock v. Kimmell*, 75 Mo. 77.

<sup>9</sup> *Alexander v. Worman*, 6 H. & N. 100; *Higgins v. Hopkins*, 3 Exch. 166; *Poucher v. Norman*, 3 B. & C. 744; *Kingston v. Kelly*, 18 L. J.

service for another, relying solely upon his generosity, and expecting to be compensated by a legacy, he cannot, when disappointed in such expectation, maintain an action at law for the value of such service.<sup>1</sup> It is, however, settled that a contract to pay for services by will is valid;<sup>2</sup> and where the promise is of a specific sum by bequest, it may be recovered, but no more;<sup>3</sup> or, if the promise is of a specific portion of the estate, its value will be the measure of recovery.<sup>4</sup> So a general promise to make compensation in the promisor's will entitles the promisee to maintain an action against the personal representative for reasonable compensation, if the promise be not fulfilled.<sup>5</sup> Any circumstances will suffice to give such right of action if they negative any inference that the services were gratuitous, or that the matter of paying for them was left to the will and pleasure of the employer.<sup>6</sup> On [442] the other hand, if the services appear to have been rendered as a gratuitous kindness, or the facts are insufficient to show an intention to pay for them, no action will lie.<sup>7</sup> Thus, where a slave servant accompanied his master from the West Indies to England, and there continued in his service without any agreement, he was held not entitled to wages.<sup>8</sup> So guardians, executors, administrators, or other trustees, are not entitled to claim compensation for their services except by virtue of a statute or contract.<sup>9</sup>

(Exch.) 360; *Lewis v. Trickey*, 20 Barb. 387; *Boylan v. Holt*, 45 Miss. 277.

In *Hay v. Walker*, 65 Mo. 17, it was held that in order to raise an implied contract to pay for labor it was not necessary there should have been an intention on the part of the laborer during his service to charge therefor; it is sufficient that the person for whom the labor was done expected to pay for it.

<sup>1</sup> *Granding v. Reading*, 10 N. J. Eq. 370; *Osborn v. Guy's Hospital*, 2 Str. 728; *Le Sage v. Coussmaker*, 1 Esp. 189; *Little v. Dawson*, 4 Dall. 111.

<sup>2</sup> *Redfield on Wills*, pt. 2, pp. 281-2; *Graham v. Graham's Ex'r*, 34 Pa. St. 475; *Myles v. Myles*, 6 Bush, 237;

*Lee v. Carter*, 52 Ind. 342; *Porter v. Dunn*, 61 Hun, 310.

<sup>3</sup> *Porter v. Dunn*, 61 Hun, 310; *Bell v. Hewitt*, 24 Ind. 280.

<sup>4</sup> *Frost v. Farr*, 53 Ind. 390.

<sup>5</sup> *Reynolds v. Robinson*, 64 N. Y. 589; *Nelson v. Masterton*, 2 Ind. App. 524; *S. C.*, 28 N. E. Rep. 731.

<sup>6</sup> *Jacobson v. La Grange*, 3 Johns. 199; *Patterson v. Patterson*, 13 id. 379; *Martin v. Wright*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576; *Robinson v. Raynor*, 28 N. Y. 494.

<sup>7</sup> 2 Add. on Cont., § 851. See *Swanzy v. Moore*, 22 Ill. 63.

<sup>8</sup> *Alfred v. Fitzjames*, 3 Esp. 3.

<sup>9</sup> *Huggins v. Rider*, 77 Ill. 360; *Barrett v. Hartley*, L. R. 2 Eq. 789; *Christophers v. White*, 10 Beav. 523;

In actions for compensation on a *quantum meruit*, the inquiry being what amount the party who has done the work deserves, every fact which will tend to enhance the merit and value of his services is admissible in evidence for his benefit; and every fact which will detract from their merit and value is admissible against him in behalf of the employer.<sup>1</sup> It is a good defense to show that the work was so unskilfully, carelessly or wrongly done that the employer thereby suffered injury, or that it was for such cause useless, and had to be done over again.<sup>2</sup> An employee engaged to perform particular services is entitled to recover therefor what they are reasonably worth, if faithfully and properly performed, notwithstanding the employer will derive no advantage from them. Thus, where an agent was employed to sell an estate, and the owner without sufficient reason refused to fulfill an agreement which the agent had made, a right to demand compensation accrued to him, and the amount was held to be ascertainable by the established usage.<sup>3</sup> A mechanic who skilfully works out the plan given him, and in a workmanlike manner follows his employer's directions, has no concern with the success and profit of his work, or with the question whether it answers [443] the purpose intended.<sup>4</sup> It is enough that an attorney is employed to carry a case on appeal to a higher court. He is not responsible for its merits or demerits, but is entitled to payment for his services, and as against this claim the inquiry whether there was anything in the appeal to argue is irrelevant.<sup>5</sup> A failure to win a case is no defense unless it is lost through the attorney's mismanagement.<sup>6</sup> In *Brown v. Post*<sup>7</sup> it was held that commissions for procuring the charter of a vessel in the port of New York are payable as soon as the

*Moore v. Frowd*, 3 Myl. & Cr. 45; *v. Clark*, 9 Cow. 57. See *Clark v. Manson v. Baillie*, 2 Macq. H. L. Cas. Fensky, 3 Kan. 389.

80; *Collins v. Carey*, 2 Beav. 128; <sup>2</sup> *Ervin v. Epps*, 15 Rich. 223; *Morgan v. Hannas*, 13 Abb. (N. S.) *Farnsworth v. Garrard*, 1 Camp. 38. 361; *Lansing v. Lansing*, 1 id. 280; <sup>3</sup> *Kock v. Emmerling*, 22 How. (U. S.) 69; *McEwen v. Kerfoot*, 37 Ill. Hopper v. Adees, 3 Duer, 235. 530. See *Walker v. Rogers*, 24 Md. 237.

<sup>1</sup> *Cadman v. Markle*, 76 Mich. 448; *530. See Walker v. Rogers*, 24 Md. 237.

*Morris v. Redfield*, 23 Vt. 295; *Moline W. P. & M. Co. v. Nichols*, 26 Ill. 90; *Robinson v. Mace*, 16 Ark. 97.

*Duncan v. Blundell*, 3 Stark. 6; *Hay-* <sup>4</sup> *Ricketts v. Sisson*, 9 Dana, 358.

*selden v. Staff*, 5 A. & E. 153; *Gleason* <sup>5</sup> *Case v. Hotchkiss*, 3 Keyes, 334.

<sup>6</sup> *Brackett v. Sears*, 15 Mich. 244.

<sup>7</sup> 6 Robt. 111.



charter is effected, and do not depend upon freight being taken or upon the voyage being completed. The plaintiffs, being ship-brokers, procured for the defendants a charter of a vessel for a voyage from New York to Cape Town, and thence to Mauritius or Batavia, the freight to be a certain sum (one dollar) and five per cent. primage in gold per barrel. The charter party provided that the charter money should be settled, if at Cape Town or Mauritius, at a certain rate of exchange in sterling (four shillings and two pence), for the price so fixed per barrel; if at Batavia, at a certain other rate of exchange in the currency of the country (two and a half guilders), for the price so fixed. No cargo ever being shipped by the vessel the charter was not performed. It was held that the plaintiffs were entitled to recover on their commissions five per cent. on the value in New York of the amount of sterling currency susceptible of being earned at Mauritius under the instrument; that the percentage to be allowed the ship-brokers is to be estimated, not by the ultimate profits actually derived from the adventure, but by what they would be if it were successful. So, if a physician has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure then being attributable to some peculiarity in the constitution of the patient for which the medical man is not responsible.<sup>1</sup> If service is performed under a contract which specifies the price to be paid for doing all the work to be done and full performance is prevented by the employer, his liability in an action upon *quantum meruit* is such proportion of the contract price as the work done bears to the whole work agreed to be done.<sup>2</sup>

[444] § 680. **Proof of the value of services.** The value of services may be determined by customary rates where such exist; they are then market values.<sup>3</sup> And upon the value of services, as upon the value of property, the opinions of witnesses properly informed on the subject may be taken.<sup>4</sup>

<sup>1</sup> 2 Add. on Cont., § 876; Kannen Doolittle v. McCullough, 12 Ohio St. v. McMullen, Peake, 59; Hupe v. 360.  
Phelps, 2 Stark. 480.

<sup>3</sup> Stanton v. Embrey, 93 U. S. 557;

<sup>2</sup> Noyes v. Pugin, 2 Wash. St. 653; Pfeil v. Kemper, 3 Wis. 315.

<sup>4</sup> Lewis v. Trickey, 20 Barb. 387;

§ 681. **A statutory day's work.** A New Hampshire statute provided that: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work unless otherwise agreed by the parties; and no person shall be required or holden to perform any more than ten hours' labor in any one day except in pursuance of an express contract requiring a greater time." In *Brooks v. Cotton*<sup>1</sup> it was held that if work is done through a season at a certain agreed price per day, and the work done from time to time in a day is done and accepted without objection as a day's work, an agreement may be implied that the work done in a day, whether on an average more or less than ten hours, shall be reckoned and paid for as a day's work. Perley, C. J., said: "The employer cannot *require* the laborer to work more than ten hours in a day without express agreement; that is to say, if the laborer is called on at any time to work more than ten hours in a day he cannot be required to do it unless he is bound to do it by an express agreement. But we do not understand that this provision reaches to the case where a laborer hired by the month or the year has voluntarily worked more than ten hours a day. If he is to be paid at a certain rate per day, it may in such case be implied, from the nature of the employment and the conduct of the parties, that what he did in a day was to be reckoned as a day's work." [445]

*Ottawa University v. Parkinson*, 14 Kan. 159, 164; *Reynolds v. Robinson*, 64 N. Y. 589; *Elting v. Sturtevant*, 41 Conn. 176; *Byrne v. Byrne*, 47 Ill. 507; *Mercur v. Vose*, 67 N. Y. 56; *McCullum v. Seward*, 62 id. 316; *Shepard v. Ashley*, 10 Allen, 542; *Madden v. Porterfield*, 8 Jones' L. 166.

In *Craig v. Derrett*, 1 J. J. Marsh. 365, it was said the jury have a right to base a verdict upon their knowledge of value.

In *Madden v. Porterfield*, 8 Jones' L. 166, it was held that it is the province of the jury to affix a value to services according to their nature and extent as proved; and that it is not necessary for witnesses to esti-

mate their value in money. See vol. 1, § 446.

<sup>1</sup> 48 N. H. 50. Under section 3738, Revised Statutes of the United States, which provides that eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed, or who may be hereafter employed by or on behalf of the government, it has been held that its purpose was not to increase wages, and that an employee who works twelve hours a day and is paid by the day, and accepts the payment, cannot be heard to maintain that every eight hours constituted a day's work. *Averill v. United States*, 14 Ct. of Cls. 200.

So in *Luske v. Hotchkiss*<sup>1</sup> it was held that a week's work under a contract for a fixed price per week was work for the period of a week, and not for six periods of eight hours each; and that, consequently, a party who under such a contract had worked sixteen hours a day could not recover for two weeks' work. It was considered that the only effect of the statute, where a case falls within it, is to release the laborer from work, and entitle him to compensation for a day's labor at the end of eight hours. If he works more than eight hours in a day, unless by special request or agreement, he cannot claim additional compensation for such extra work. The plaintiff contracted to conduct a coal gas establishment for the defendant, receiving a fixed sum per week as wages. The business was of such a nature as to require sixteen or more hours per day, and the contract was made with an understanding on both sides of this fact. It was held that the case did not fall within the operation of the statute.

§ 682. **Recovery for attorney's services.** If an attorney brings suit for professional services, anything which shows that they were not of the value claimed is competent; the nature of the suit conducted, the difficulties of it, the skill required and exercised may be shown. A trial may result successfully, and yet the attorney have been guilty of negligence. To obviate the effect of his negligence and want of skill the client may have been put to expense; if so, the fact will reduce the value of the services.<sup>2</sup> In an action to recover counsel fees for services in a chancery suit the papers and records therein are competent evidence to show the character of the suit, the amount involved, and what has been done in it.<sup>3</sup> A client who has notice of the terms fixed by a bar fee-bill and [446] employs counsel at that bar will be bound by the rates

<sup>1</sup> 37 Conn. 219.

<sup>2</sup> *Nixon v. Phelps*, 29 Vt. 198; *Brackett v. Sears*, 15 Mich. 244; *Bridges v. Hall*, 13 Cal. 630; *Cox v. Livingston*, 2 W. & S. 103; *Hopping v. Quinn*, 12 Wend. 517; *Runyon v. Nichols*, 11 Johns. 547; *Stow v. Hamlin*, 16 How. Pr. 452; *Webb v. Browning*, 14 Mo. 354; *Smith v. Davis*, 45 N. H. 566; *Garr v. Mairet*,

1 Hilt. 498. See *Templar v. McLachlan*, 2 B. & P. N. R. 136.

It was held in *Keenan v. Dorflinger*, 19 How. Pr. 153, that the taxable costs are *prima facie* the measure of an attorney's compensation for services in an action carried to judgment.

<sup>3</sup> *Boylan v. Holt*, 45 Miss. 277.



so fixed, on the ground that he has impliedly consented to them.<sup>1</sup> Attorneys at law are professional laborers who assume, by accepting a retainer, peculiar responsibilities; they are entitled to remuneration proportioned to the importance of their undertakings, and the diligence, skill and knowledge required for the proper performance of their duties. Formerly the higher grade of practitioners were presumed not to perform professional services with any mercenary view, and were unable to make any binding contract for advocacy in litigation or to maintain any action for their services, even upon an express contract to pay a stipulated sum, and this is now the law in England;<sup>2</sup> but this scruple and the dis- [448]

<sup>1</sup> Boylan v. Holt, 45 Miss. 277.

<sup>2</sup> Kennedy v. Brown, 13 C. B. (N. S.) 611. This case presents a masterly and exhaustive review of the authorities and traditions upon this subject. The following are extracts from the opinion of Erle, C. J.: "The material facts upon the first question (*i. e.*, whether there was 'no evidence of debt') are that in the course of the suit between Swifen and Swifen, the plaintiff, a barrister, became the advocate of Mrs. Swifen, who, with her husband, are now defendants; that during the continuance of that litigation she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same; and that after the end of the litigation she spoke of the amount of his remuneration; and for the purpose of the present judgment we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it. These facts are no evidence to support the verdict if the promise of the defendant did not constitute any obligation; and we are of opinion that it did not. We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before or after the litigation, has no binding

effect; and furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

"For authority in support of these propositions we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate; and as the number of precedents has been immense, the force of the negative fact is proportionately great. To this we add the tradition and understanding of the profession, both as known to living memory and as expressed in former times. Sir John Davys (Davys' Report, preface, page 23) declares that understanding at the beginning of the seventeenth century, when he says that 'the fees of the professors of the law are not duties certain growing due by contract for labor or service, but gifts; not *merces*, but *honorarium*.' [447] Sir John Davys would have ample experience of the rules of the profession from his eminence in the law; and his opinion is entitled to much



ability based thereon do not extensively prevail in this country. All grades of practitioners may contract their services

weight. Lord Stowell, as appears in a work remarkable for learned research — Wallace's Reporters, p. 27 — speaks of him as 'a poet, a lawyer and a statesman, and highly distinguished in each of these characters.' Lord Nottingham declares the same understanding of the profession in the note to Co. Littleton, 295, a, saying: 'A counselor cannot bring any action (*i. e.*, for his fees), for he is not compellable to be a counselor; his fee is *honorarium*, and not a debt.' The same note contains the opinion of Mr. Butler to the same effect, saying that in England the fees of counsel are honorary in the strict acceptation of the word. Blackstone also (vol. 3, p. 28) declares the same understanding: 'A counsel can maintain no action for his fees, which are given, not as *locatio* and *conductio*, but as *quiddam honorarium*, not as salary or hire, but as mere gratuity.' As we know of no authorities that conflict with these, we only add the names of the judges who have had occasion to declare an opinion to the same effect; and they are Lord Hardwicke (*Thornhill v. Evans*, 2 Atk. 330), Lord Kenyon (*Turner v. Phillips*, Peake's N. P. Cas. 166), Kendersley, V. C., (*Re May*, 4 Jurist (N. S.), 1169), Pigot, C. B., (*Hobart v. Butler*, 9 Ir. C. L. (N. S.) 157), and Bayley, J., and Best, J., (*Morris v. Hunt*, 1 Chit. 544). These are authority for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the services of the counsel in litigation. There is the same absence of any precedent for such an action, and the reason for the one incapacity is good for both.

"The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client if the hiring of counsel was made binding. In this case the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict of 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured to her by the former advocate with the perils and the miseries of wearisome litigation, derived from her later advocate, the contrast may suggest that gratuitous advocacy is preferable to contract as a mode of remunerating advocates. But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz.: the administration of justice. We are aware that, in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless com-

and recover for them.<sup>1</sup> And in many states statutes [449] have been passed expressly authorizing attorneys to fix the measure and mode of their compensation by agreement with their clients. But on account of their confidential relations

petition proportioned to the prize to be gained, that is, wealth, and power and honor without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at all times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of the truth. It is of the last importance that the sense of duty should be in active energy, proportioned to the magnitude of those interests. If the law is, that the advocate is incapable of contracting for

hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's rights, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

"If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamor and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guaranties for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them.

"Such is the system of advocacy

<sup>1</sup> Ames v. Gilman, 10 Met. 239; Thurston v. Percival, 1 Pick. 415; Stevens v. Adams, 23 Wend. 57; Adams v. Stevens, 26 id. 451; Wilson v. Burr, 25 id. 386; Merritt v. Lambert, 10 Paige, 352; Wallis v. Loubat, 2 Denio, 607; Case v. Hotchkiss, 3 Keyes, 334; Smith v. Hill, 13 Ark. 173; Smith v. Davis, 45 N. H. 535; Creiger v. Cheesbrough, 25 How. Pr. 200; Brackett v. Sears, 15 Mich. 244; Stevens v. Monges, 1 Harr. (Del.) 127; Duncan v. Breithaupt, 1 McCord, 149; Clendinen v. Black, 2 Bailey, 488; Christy v. Douglass, Wright (Ohio), 485; Baird v. Ratcliffe,

10 Tex. 81; Webb v. Browning, 14 Mo. 354; Newman v. Washington, Mart. & Yerg. 79; Rust v. Larue, 4 Litt. 411; Caldwell v. Shepherd, 6 T. B. Mon. 389; Foster v. Jack, 4 Watts. 334; Balspaugh v. Frazer, 19 Pa. St. 95; Dubois' Appeal, 38 id. 231; Lichty v. Hayne, id. 434; Maynard v. Briggs, 26 Vt. 94.

In New Jersey an action will not lie to recover counsel fees, unless, perhaps, there is an express contract. Seely v. Cram, 5 N. J. L. 35; Van Atta v. McKinney, 16 id. 235. See Hyer v. Little, 20 N. J. Eq. 443.

their contracts are subject to careful scrutiny for the protection of the client.<sup>1</sup> Attorneys and solicitors are entitled to have allowed them for their professional services what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning and skill; and for the purpose of aiding the jury to determine that matter it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court.<sup>2</sup> If the contract provides for compensation based upon a proportion of the property which may be recovered, and the client compromises the litigation for a sum which does not bear a fair ratio to such proportion, the attorney is not limited in his recovery to the same proportion of the money received by way of compromise as he would have been entitled to receive of the property if there had not been

intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded. It may also be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive." See *Brown v.*

*Kennedy*, 33 L. J. (Ch.) 71, 342; *Veitch v. Russell*, 3 Q. B. 928; *Mostyn v. Mostyn*, L. R. 5 Ch. 457.

<sup>1</sup> *Stanton v. Haskin*, 1 MacArthur, 558; *Rose v. Mynatt*, 7 Yerg. 30.

In *Lecatt v. Sallee*, 3 Port. 115, it was held that an agreement made by a client with his counsel, after the latter had been employed in a particular business by which the original contract was varied, and greater compensation secured to the counsel than was at first agreed upon, is invalid, and cannot be enforced; that if a bond or other security for a greater compensation be taken from a client by an attorney during their connection, it will, upon application to a court of equity, be either set aside or ordered only as security for the sum to which the attorney would have been entitled if no such bond had been given.

<sup>2</sup> *Stanton v. Embry*, 93 U. S. 557; *Vilas v. Downer*, 21 Vt. 419; *Eggles-ton v. Boardman*, 37 Mich. 14; *Babbitt v. Bumpus*, 73 Mich. 331; *Kelley v. Richardson*, 69 id. 430.

a compromise.<sup>1</sup> But if the compensation agreed upon is contingent upon success, the attorney, though his employment is wrongfully terminated, is not entitled to recover if the litigation could not have been brought to a termination in favor of his client.<sup>2</sup> If the result is favorable to the client the attorney is entitled to the share agreed upon, without deduction.<sup>3</sup> On the client's breach of a special contract for legal services he is liable for the amount he has agreed to pay, subject to such abatement as would in the natural course of things have been incurred in the way of expense by the attorney if he had been permitted to perform his agreement. The value of his services will not be apportioned; and while the attorney will not be put upon the *quantum meruit*, he will not be allowed to recover more than he would if he had gone on with the case. His time does not belong wholly to his client, and hence no deduction can, in ordinary cases, be justly made on the presumption that it was wholly occupied in other professional business.<sup>4</sup> If attorneys and clients make contracts for the former's services to be rendered in another state than that in which they reside, their compensation will be governed by the rate in the state of their domicile, rather than by that which prevails in the state in which the services were performed.<sup>5</sup> An attorney who is employed as such to take charge of matters which involve the performance of services clearly professional in their nature, and also those which are not necessarily of that character, may recover therefor, it being impossible to draw the line between the two classes, on the basis that all the services rendered are professional.<sup>6</sup>

**§ 683. Broker's services.** Where a broker, pursuant to his employment or the instructions of his principal, sells goods to arrive he may recover his commissions though the goods do not arrive. In such a case the broker does all he undertook,

<sup>1</sup> *Duke v. Harper*, 8 Mo. App. 296.

<sup>2</sup> *Swinerton v. Monterey Co.*, 76 Cal. 113.

<sup>3</sup> *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218.

<sup>4</sup> *Brodie v. Watkins*, 33 Ala. 545 (the deductions made in this case were the expenses which would have been incurred in attending court

and incidental disbursements which could not be charged to the client); *Moyer v. Cantieny*, 41 Minn. 242; *Webb v. Trescony*, 76 Cal. 621.

<sup>5</sup> *Stanberry v. Gibson*, 35 Iowa, 493.

<sup>6</sup> *Kelley v. Richardson*, 69 Mich. 430.



[450] and should not be deprived of compensation because, without his fault, the event upon which the contingent agreement would become absolute did not take place.<sup>1</sup> So where a broker who was employed to obtain a loan of \$9,000 was promised one per cent. commission, found a person willing to make a loan of \$7,000, which the principal agreed to take, but afterwards declined, such broker was held entitled to his commission, and an allowance at the agreed rate was affirmed.<sup>2</sup> Where no custom to the contrary is shown, a broker, like any other person who performs service for another, is entitled to compensation; and it matters not whether what he has done proves beneficial to the party who employs him or not; if he has fully performed what he undertook to do he is entitled to be remunerated.<sup>3</sup>

If a mercantile usage prevails, and is shown, by which nothing is to be allowed to the broker unless the matter brought about by his instrumentality is completed, he can only recover in accordance with it, and especially where, by such usage, a larger compensation is allowed by reason of the contingency.<sup>4</sup> In such case the claim of the broker rests upon the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and, if that is not satisfied, no claim at all arises, for no other contract can be implied.<sup>5</sup> Where an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labor; he is not bound to resort to a special action for the withdrawal of the authority; the contract to pay what is reasonable is implied by law; it is not a question of fact for a jury; and the proper measure of damages is the entire amount of the agreed commission.<sup>6</sup> Where a land-owner agreed with

<sup>1</sup> Paulsen v. Dallett, 2 Daly, 40.

<sup>2</sup> Van Lien v. Byrnes, 1 Hilt. 133.

<sup>3</sup> Id.; Read v. Rann, 10 B. & C. 438; Dalton v. Irwin, 4 C. & P. 289; Broad v. Thomas, 7 Bing. 99.

<sup>4</sup> Broad v. Thomas, 7 Bing. 99.

<sup>5</sup> Read v. Rann, *supra*.

<sup>6</sup> Prickett v. Badger, 1 C. B. (N. S.)

296; Planche v. Colburn, 8 Bing. 14;

Moses v. Bierling, 31 N. Y. 462;

Doty v. Miller, 43 Barb. 529; Middleton v. Findley, 25 Cal. 76; Knapp v.

Wallace, 4 N. Y. 477; Cook v. Fiske,

12 Gray, 491; Cook v. Welch, 9 Al-

len, 350; Wheeler v. Knaggs, 8 Ohio,

169; Evrit v. Bancroft, 22 Ohio St.

an agent that the latter might dispose of land within a time limited for a share of the profits arising from the sale, and in the performance of such agreement the agent rendered services and expended time and money, and the principal unjustifiably revoked the contract, he was held liable for such sum as the agent's share of the profits would have been if the sale had been made.<sup>1</sup>

If a broker is employed, and no special compensation [451] is agreed on, the customary rate of brokerage is the proper rate of compensation for his services.<sup>2</sup> But if one not a broker is employed to negotiate he is entitled to the reasonable worth of his services, which may be more or less than the usual brokerage.<sup>3</sup> The right of one rendering services for another to have their value estimated under a *quantum meruit* upon the basis of commissions can only arise out of general custom.<sup>4</sup> The broker must perform his duty in such manner as to reasonably answer the intended purpose; and if he performs it so loosely that his principal can obtain no benefit from it the former cannot recover compensation.<sup>5</sup> All

172; *Rees v. Spruance*, 45 Ill. 308; *Chilton v. Butler*, 1 E. D. Smith, 150; *Morgan v. Mason*, 4 id. 636; *Short v. Millard*, 68 Ill. 292; *Glenworth v. Luther*, 21 Barb. 145; *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Clapp v. Hughes*, 1 Phila. 382; *Bailey v. Chapman*, 41 Mo. 536; *Stillman v. Mitchell*, 2 Robt. 523; *Edwards v. Goldsmith*, 16 Pa. St. 43.

The plaintiff consigned to the defendant four hundred and ninety-seven barrels of whisky, to be sold on commission of two and a half per cent.; defendant sold eighty-four barrels; the plaintiff sold two hundred and twenty barrels and gave an order on the defendant for delivery of them. Defendant having complied with the order refused to deliver the remaining one hundred and ninety-three barrels without being paid commissions on the whole, which the plaintiff paid, and brought

suit to recover back all the commissions except on the eighty-four barrels; held, that the defendant was entitled to commissions on the two hundred and twenty barrels, and such part of the agreed commission as was in proportion to the trouble and risk he had for the balance unsold; such proportion as the service and risk incurred bore to the whole trouble and risk of making sale; and was bound to refund what had been demanded beyond that sum. *Briggs v. Boyd*, 65 Barb. 197.

<sup>1</sup> *Durkee v. Gunn*, 41 Kan. 496; *Hawley v. Smith*, 45 Ind. 183.

<sup>2</sup> *Erben v. Lorillard*, 2 Keyes, 567.

<sup>3</sup> *Id.*; *Dyer v. Sutherland*, 75 Ill. 583.

<sup>4</sup> *Id.*

<sup>5</sup> *Hammond v. Holiday*, 1 C. & P. 384. See *Hill v. Featherstonhaugh*, 7 Bing. 569.

agents will forfeit their right to compensation by misconduct which injures their principal.<sup>1</sup>

§ 684. **Various modes of compensating services.** Contracts providing specific compensation for services thereby fix, as has been stated, the measure of damages recoverable on the performance of the stipulated work. This compensation may be a share of net profits in a business;<sup>2</sup> a share [452] of crops to be raised on a farm;<sup>3</sup> such sum as can be raised by voluntary subscriptions for the purpose of such compensation;<sup>4</sup> or wages may, by agreement, be specific property, in which case, if not delivered or transferred, the employee may recover its value, when he is entitled to receive it, with interest.<sup>5</sup> For the breach of a contract to compensate for services with clothing and attendance on school in winter, under a special count based upon a breach as to the attendance on school and alleging that the plaintiff was kept at work, the damages are not measured by the value of the services rendered while he was deprived of his right.<sup>6</sup> Where the consideration to be paid for services was a pass over the defendant's road the court thought the value was so uncertain as to be incapable of proof, and allowed a recovery upon a

<sup>1</sup> *Sea v. Carpenter*, 16 Ohio, 412; *Segar v. Parrish*, 20 Gratt. 672.

<sup>2</sup> *Wiggins v. Graham*, 51 Mo. 17; *Morrison v. Galloway*, 2 Har. & J. 461; *Jennery v. Olmstead*, 90 N. Y. 363; *Woodberry v. Warner*, 53 Ark. 488. See *Ellster v. Brooks*, 54 N. Y. Super. Ct. 73.

<sup>3</sup> *Owens v. Durham*, 5 Dana, 536.

<sup>4</sup> *Myers v. Baptist Society*, 38 Vt. 614. In this case the defendant, a religious society, engaged the plaintiff to become its pastor for one year for \$300. About the commencement of the second year the defendant informed him that the amount subscribed was less than that of the first year, and he agreed to remain for such sum as could be raised by subscription, the defendant to collect the subscriptions. The defendant having failed to collect and pay over

the subscriptions in full, the plaintiff commenced an action to recover for his services as pastor, he having continued as such for the defendant for five years under the same agreement. It was held that the contract was one of hire through the whole time, under which the defendant was bound to pay the plaintiff for his services; that the defendant was bound to use due diligence in obtaining and collecting subscriptions, and the plaintiff was entitled to recover such an amount as might have been collected.

<sup>5</sup> *Strutt v. Farlar*, 16 M. & W. 249; *Owens v. Durham*, 5 Dana, 536; *Stone v. Stone*, 43 Vt. 180; *Fairbank's Ex'rs v. Humphreys*, 18 Q. B. Div. 54; *Gibson v. Whip Pub. Co.*, 28 Mo. App. 450; *Woodberry v. Warner*, 53 Ark. 488.

<sup>6</sup> *Burroughs v. Morse*, 48 Mich. 520.

*quantum meruit*.<sup>1</sup> But it has been held that the value of a life pass for a plaintiff and his family was not so uncertain as to be incapable of ascertainment.<sup>2</sup>

If the employer is in no default in the payment he has a right to make it in the very mode specified in the contract. Thus, the plaintiff agreed that his minor son should work for the defendant for a certain time, to be compensated by the defendant boarding, clothing and schooling the son; the son worked a part of the time and then voluntarily abandoned the defendant without his consent; it was held that the law would not imply a promise to pay in money what the services of the son were reasonably worth beyond the damages caused by his failure to complete the contract, the defendant being always ready to pay in the manner stipulated. The same rule applies though the contract is void by the statute of frauds. If the employer is willing to abide by the void contract, has not repudiated it, or done anything to put it out of his power to fulfill it, he cannot be made to pay in any other mode. The existence of such a contract will negative any tacit promise to make payment in any manner or on any terms different from those mentioned in it.<sup>3</sup> But where a contract providing [453] for a fixed compensation for services and a particular mode of payment is void by the statute of frauds for not being in writing, if the employer violates or repudiates it after services have been performed, they may be recovered for on a *quantum meruit*, as services performed on request, without regard to the rate or mode of compensation contemplated in such contract.<sup>4</sup> If the services were to be paid for by conveyance of specific land, the contract being verbal and void, the value of the land on a *quantum meruit* is not the fixed measure of damages. But it has been held that such value is competent evidence to be considered on the question of damages.<sup>5</sup> Where

<sup>1</sup> Brown v. St. Paul, etc. Ry. Co., 36 Minn. 236.

<sup>2</sup> Erie & P. R. Co. v. Douthet, 88 Pa. St. 243.

<sup>3</sup> Roundy v. Thatcher, 49 N. H. 526; Campbell v. Campbell, 65 Barb. 639; Abbott v. Draper, 4 Denio, 51; Quackenbush v. Ehle, 5 Barb. 469. See Burroughs v. Morse, 48 Mich. 520.

<sup>4</sup> Wallace v. Long, 105 Ind. 522; Rodman v. Woolman, 2 Houst. 581; Watson v. Watson, 1 id. 209; Jones v. Hay, 52 Barb. 501; Updike v. Tenbroeck, 32 N. J. L. 105; William B. St. Co. v. Atkinson, 68 Ill. 421. See King v. Brown, 2 Hill, 485.

<sup>5</sup> Ham v. Goodrich, 37 N. H. 185; Abbott v. Draper, 4 Denio, 51



a verbal contract, void because not to be performed within a year, provided for service for two years, at \$100 for the first year and \$200 for the second, and was proved on the trial, and was the only evidence tending to show any understanding between the parties in respect to the compensation for the second year, an instruction that if during the second year the parties understood that the wages were to be \$200 the amount would be fixed by that understanding was held erroneous;<sup>1</sup> for otherwise the statute would be evaded by giving effect to the contract.<sup>2</sup>

**§ 685. Continuation of original contract.** If a person enters the service of another under an express contract specifying the time and wages, and continues in the same employment after his term has ended without any new bargain, he will be considered as working under the original contract, or as re-engaged on the same terms.<sup>3</sup>

**§ 686. Necessity of full performance of entire contract.** [454] The general principle is, that where there is an express contract none can be implied relating to the same subject. The rule is of extensive application. On this principle, and so far as it governs, if work is done under a special contract recovery for it can be had only by action on the contract, at least where such an action can be maintained, and when it appears that compensation has been earned and is due according to its provisions. Accordingly, under an agreement which is entire, to pay a gross sum for a particular term of service or for doing a designated piece of work, performance is a condition precedent, and no action can be maintained on the contract without alleging and proving that the condition has been fulfilled. Hence, unless there is some exception to the general principle excluding an implied promise where there is an express contract, and to the consequent rule requiring the action to be brought on the contract, there can be no recovery

<sup>1</sup> *Emery v. Smith*, 46 N. H. 151.

<sup>2</sup> *Earl of Falmouth v. Thomas*, 1 C. & M. 89; *King v. Brown*, 2 Hill, 485; *Hill v. Hooper*, 1 Gray, 131.

<sup>3</sup> *Grover & B. S. M. Co. v. Bulkley*, 49 Ill. 189; *Huntingdon v. Claffin*, 38 N. Y. 182; *Vail v. Jersey Little Falls M. Co.*, 32 Barb. 564; *Nicholson v.*

*Patchin*, 5 Cal. 474; *Ranck v. Albright*, 36 Pa. St. 367; *Greer v. People's Telephone & T. Co.*, 50 N. Y. Super. Ct. 517; *Adams v. Fitzpatrick*, 56 id. 580. See *Tucker v. Philadelphia & R. C. & I. Co.*, 53 Hun. 139; *Castigan v. Mohawk, etc. R. Co.*, 2 Denio, 609.

for part performance of an entire contract however beneficial it may be to the employer. There are exceptions both as to the necessity of suing upon the contract, and also as to the right to recover only upon complete performance; but they do not embrace all cases of part performance. In respect to contracts for services the rigorous rule is generally enforced; and where there is a hiring for a particular term as an entire contract there can be no recovery if the party hired voluntarily quits, without cause or the consent of his employer, before the expiration of that term.<sup>1</sup> There is a like inability in England to recover for part of the service stipulated

<sup>1</sup>St. Albans Steam B. Co. v. Wilkins, 8 Vt. 54; Sherman v. Transportation Co., 31 Vt. 162; Henderhen v. Cook, 66 Barb. 21; Lewis v. Esther, 2 Cranch C. C. 423; Bowling v. Varnum, id. 423; Shaw v. Turnpike Co., 3 Penn. 445; Krouse v. Deblois, 1 Cranch C. C. 156; Hutchinson v. Wetmore, 2 Cal. 310; Hogan v. Titlow, 14 Cal. 255; Schnerr v. Lemp, 19 Mo. 40; Winn v. Southgate, 17 Vt. 355; Patnote v. Sanders, 41 Vt. 66; Holmes v. Stummel, 24 Ill. 370; Bellinger v. Craigue, 31 Barb. 534; Clark v. Gilbert, 32 Barb. 576; 26 N. Y. 279; Halloway v. Lacy, 4 Humph. 468; Olmstead v. Beale, 19 Pick. 528; Stark v. Parker, 2 Pick. 267; Givhan v. Dailly, 4 Ala. 336; Whitley v. Murray, 34 Ala. 155; Greene v. Linton, 7 Port. 133; Suber v. Vanlew, 2 Spear, 126; Abernathy v. Black, 2 Cold. 314; Posey v. Garth, 7 Mo. 94; Caldwell v. Dickson, 17 id. 575; Hinson v. Hampton, 32 id. 408; Aaron v. Moore, 34 id. 79; Larkin v. Buck, 11 Ohio St. 561; Noon v. Salisbury Mills, 3 Allen, 340; Cushman v. Sim, 2 Har. & J. 352; Brown v. Kimball, 12 Vt. 617; Cahill v. Patterson, 30 id. 592; Ewing v. Ingram, 24 N. J. L. 520; Hughes v. Cannon, 1 Sneed, 622; Marsh v. Ruleson, 1 Wend. 514; Hansell v. Erickson, 28 Ill. 257; Angle v. Hanna, 22 id. 429; Mullen v. Gilken- son, 19 Vt. 503; Ripley v. Chipman, 13 id. 268; Hubbard v. Belden, 27 id. 645; Patrick v. Putnam, id. 759; Forsyth v. Hastings, id. 646; Mack v. Bragg, 30 id. 571; Hennessey v. Farrell, 4 Cush. 267; Davis v. Maxwell, 12 Met. 286; Jewell v. Thompson, 2 Litt. 52; Wright v. Wright, 1 id. 179; Morford v. Ambrose, 3 J. J. Marsh. 688; Rounds v. Baxter, 4 Me. 454; Miller v. Goddard, 34 id. 102; Green v. Gilbert, 21 Wis. 395; Evans v. Bennett, 7 id. 404; Henderson v. Stiles, 14 Ga. 135; Codey v. Raynaud, 1 Colo. 272; State v. Beard, 1 Ind. 460; De Camp v. Stevens, 4 Blackf. 24; Jennings v. Camp, 13 Johns. 94; Webb v. Duckingfield, id. 390; Lantry v. Parks, 8 Cow. 63; McMillan v. Vanderlip, 12 Johns. 165; Wolfe v. Howes, 20 N. Y. 197; Monell v. Burns, 4 Denio, 121; Taft v. Montague, 14 Mass. 282; Preston v. American Linen Co., 119 Mass. 400.

In Hughes v. Cannon, 1 Sneed, 622, the court refers to several Tennessee cases on special contracts for particular works, where a liberal rule for recovery on a *quantum meruit* for part performance had been laid down, and say of them: "Without impugning the rule laid down by this court in the cases referred to, where benefit has been conferred by the use of materials or valuable

for or wages for the current broken period in an entire contract, where the employee is discharged by his employer for good cause.<sup>1</sup> The rule has been so held in this country where the servant has been discharged for criminal violations of his duty.<sup>2</sup> The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, but subject to deductions for his torts or deficiencies.<sup>3</sup> When a laborer or other employee professing to be skilled in some particular work, art or mystery has been hired on that account, and for the exercise of the professed skill, and is found to be incompetent to do what he undertook, the employer is not obliged to go on employing him to the end of the term, [456] but may at once dismiss him.<sup>4</sup> So he may be dismissed for misconduct which involves a violation of duty in his employment or position.<sup>5</sup>

The requirement to fulfill the precedent condition to do the entire work for which a gross sum is promised to be paid results as a logical conclusion from such a contract; it is thus derived from the supposed intention of the parties, because they are held to mean what the contract thus expounded requires. What is done, short of full performance, being referable exclusively to the contract, there is no operative promise to pay for it, the express promise excluding any other, and is not itself available until all the work is done. There is no defect in the logic of this rule; and it may be said that as it never applies except to carry out the intention of the parties,

things furnished under contracts, we hold that it is different in the case of contracts for personal service."

<sup>1</sup> *Atkin v. Acton*, 4 C. & P. 208; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171; *Walsh v. Walley*, L. R. 9 Q. B. 367; 43 L. J. (Q. B.) 102; *Turner v. Robinson*, 6 C. & P. 15.

<sup>2</sup> *Libhart v. Wood*, 1 W. & S. 265.

<sup>3</sup> *Murdock v. Phillips Academy*, 12 Pick. 244; *Carroll v. Welch*, 26 Tex. 147; *Green v. Hulett*, 22 Vt. 188; *Taylor v. Peterson*, 9 La. Ann. 251; *Congregation of Children of Israel v. Peres*, 2 Cold. 620; *Eaken v. Harrison*, 4 McCord, 249.

<sup>4</sup> *Horton v. McMurtry*, 5 H. & N. 667.

<sup>5</sup> *Harmer v. Cornelius*, 5 C. B. (N. S.) 235; *Robinson v. Hindman*, 3 Esp. 235; *Atkin v. Acton*, 4 C. & P. 208; *Lilley v. Elwin*, 11 Q. B. 742; *Arding v. Lomax*, 24 L. J. (Ex. Ch.) 80; S. C., 10 Exch. 734; *Shaw v. Chairitie*, 3 C. & K. 25; *Spain v. Arnott*, 2 Stark. 256; *Read v. Dunsmore*, 9 C. & P. 588; *Lacy v. Osbaldiston*, 8 id. 80; *Turner v. Mason*, 14 M. & W. 112; *Amor v. Fearon*, 1 Perry & D. 398; *Wise v. Wilson*, 1 Car. & K. 662; *Lamby v. Gage*, 2 E. & B. 216.

it is not to the rigor of the law, but to the improvidence of the contract, that any hardship in individual cases must be ascribed. It is true the employee might stipulate for a different rule, or an exception, if he should be prevented by sickness or death from completely fulfilling; and it may be deemed his fault that he has entered into a contract in such form that in no event but that of full performance can he claim any compensation. Formerly this logic was law, invariably enforced; the intention of the parties, deduced by this rule of construction, was the iron rule and law of their contract, not dispensable, or subject to any legal evasion or mitigation. Thus it was held that where a sailor hired for a voyage took a promissory note from his employer for a certain sum, provided he should proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship died, no wages could be claimed either on the contract or on a *quantum meruit*.<sup>1</sup> The intention of the parties is still the law of contracts, and even in the matter of performing [457] conditions precedent there has been slight amelioration of the rule. If a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him.<sup>2</sup>

**§ 687. Dispensation in case of inability.** The rule which binds parties to fulfill contracts has been somewhat relaxed by applying an equity to relieve against penalties, and by admitting exceptions to the principle that an express contract excludes an implied promise on the same subject. This implication of a promise is so purely a fiction to enforce an equitable duty that, in this class of contracts, the implication is sometimes that of a proviso to the express contract leading to the same result. Thus, it is now well settled that if the employee is prevented by sickness or death from performing an entire contract for labor, where such performance is by the terms of the contract a condition precedent to the right to claim any compensation, he will not, for such failure, be

<sup>1</sup> *Cutter v. Powell*, 6 T. R. 320; 2 *dyne v. Jayne*, Allyn, 26; *Beal v. Smith's Lead*, Cas. 17. *Thompson*, 3 B. & P. 405; *Beebe v.*

<sup>2</sup> *Dermott v. Jones*, 2 Wall. 1; *Para-Johnson*, 19 Wend. 500.



denied all right to be paid for what he has done.<sup>1</sup> The election of an attorney to the bench was held to afford such excuse for not completing contracts for professional services that he could recover for part performance on a *quantum meruit*.<sup>2</sup> So when the contract was dissolved by the servant being called away as a witness.<sup>3</sup> In *Smith v. Hill*<sup>4</sup> a firm of lawyers contracted with a client for the personal services of a particular partner. It was held that if he failed to perform [458] though it was a breach of the contract, the damages would be but nominal, if another partner had performed the stipulated service with equal professional skill and without injury to the client; that such a contract cannot be abandoned by the client upon the death of the partner whose services he has engaged, without tendering to the survivor a fair compensation for the services already rendered; and if the latter render the service with due professional skill and diligence he will be entitled to the entire fee. But the amount of recovery will be reduced by any damage sustained by the employer in consequence of the contract not being strictly and literally performed.<sup>5</sup> In a New York case<sup>6</sup> it is said: "This rule is equitable, and it should be applied to such cases although the servant is not to be regarded as violating his contract in consequence of his inability fully to perform it by reason of his sickness or death. His failure fully to perform his contract for such cause is his misfortune and not his fault; and his employer should neither gain nor lose by it. . . . Much more might be said in favor of this rule, but it needs no vindication; it is so well grounded in good sense it sufficiently commends itself. It may be said to be a common sense rule, and common sense is the basis of all just law." In an explanatory

<sup>1</sup> *La Du-King Manuf. Co. v. La Du*, 36 Minn. 473; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, id. 759; *Wolfe v. Howes*, 20 N. Y. 197; S. C., 24 Barb. 174; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Met. 440; *Jones v. Judd*, 4 N. Y. 412; *Fahy v. North*, 19 Barb. 341; *Hunter v. Waldron*, 7 Ala. 753; *Greene v. Linton*, 7 Port. 133; *Dickey v. Linscott*, 20 Me. 453; *Smith v. Hill*, 13 Ark. 173; *Moulton v. Trask*, 9 Met. 577; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82; *Clendinen v. Black*, 2 Bailey, 488; *Callahan v. Shotwell*, 60 Mo. 398; *Lacy v. Getman*, 119 N. Y. 109.

<sup>2</sup> *Baird v. Ratcliff*, 10 Tex. 81.

<sup>3</sup> *Melville v. De Wolf*, 4 E. & B. 844.

<sup>4</sup> 13 Ark. 173.

<sup>5</sup> *Smith v. Hill*, 13 Ark. 173.

<sup>6</sup> *Clark v. Gilbert*, 26 N. Y. 279.

note to this case it is said that some of the judges dissented from the idea that the person employed, not being in fault in dying, could be treated as liable to damages to compensate the employer for a reduction of the profits in the further prosecution of the work, arising from the loss of such employee's services. In such cases, however, such allowance to the employer is not strictly damages; that allowance is essential to a fair apportionment of wages earned on the basis of the contract.

§ 688. **Same subject.** In *Jones v. Judd*<sup>1</sup> an action was brought by subcontractors for part of the work of constructing a canal. This contract was with the party who had contracted with the state, and their contract specified one price per yard for excavation and another for embankment, and provided that the employer might reserve ten per cent. until the final estimate. The defendant proved on the trial that [459] the work done was worth less than the contract prices, and offered to prove that the remaining work was more difficult and would be more expensive, but this evidence was rejected. The court of appeals, evenly divided on the question, held it was properly rejected; and as it appears to the writer erroneously, on the general theory of the prevailing opinion; for the plaintiffs were thus permitted to recover more than was due on the basis that the defendant was not at fault, and therefore not liable to damages. In such an adjustment the contract price, uniform for all the work, would not be due for a part relatively easier and less expensive to do. Gardiner, J., said: "If the contract had been performed by the plaintiffs they might have recovered upon the special agreement, or upon the common counts, and in either case they would be entitled to the price fixed by the agreement.<sup>2</sup> If the performance had been arrested by the act or omission of the defendant, the plaintiffs would have had their election to treat the contract as rescinded, and recover on the *quantum meruit* the value of their labor, or they might sue upon the agreement and recover for the work completed according to the contract, and for the loss in profits or otherwise which they had sustained by the

<sup>1</sup> 4 N. Y. 412.

Delaware & H. Canal Co., 4 Wend.

<sup>2</sup> Phil. Ev. 109 (2d ed.); *Dubois v.* 285, and cases cited.

interruption.<sup>1</sup> In this case the performance was forbidden by the state. Neither party was in default. All the work for which recovery was sought was done *under the contract*, which fixed a precise sum to be paid for each yard of earth removed without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant.<sup>2</sup> The defendants, in the language of Judge Beardsley, 'are not by their wrongful act to deprive the plaintiff of the advantage secured by the contract.' Here there was no breach of the agreement by either party. The [460] plaintiffs could not recover profits, and the defendant cannot, consequently, recoup them in this action.<sup>3</sup> Again, the plaintiffs assumed the risk of all accidents which might enhance the expense of the work while the contract was subsisting;<sup>4</sup> and are entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work by state authority was an accident unexpected by either party. It was one which, under the offer, we are bound to assume was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price for what has been done unless he could demand it in case a flood had partially excavated or embanked the section of the canal to be completed by the plaintiffs."

In *Fahy v. North*<sup>5</sup> a laborer was hired for a year commencing in November to work on a farm. He worked until July, when he was taken sick; he was taken care of in the employer's family, and after three weeks recovered and offered to work his time out, which the employer would consent to if the party employed would allow \$20 damages for the time lost. The court held that this claim was not admissible, and that requiring such an allowance as a condition to permitting him to resume work justified him in departing, and gave him

<sup>1</sup> *Linningdale v. Livingston*, 10 Johns. 36; *Boorman v. Nash*, 9 B. & C. 145; *Masterton v. Mayor*, 7 Hill, 69.

<sup>2</sup> 7 Hill, 71, 73.

<sup>3</sup> *Blanchard v. Ely*, 21 Wend. 346.

<sup>4</sup> *Boyle v. Canal Co.*, 22 Pick. 384; *Sherman v. Mayor*, 1 N. Y. 316.

<sup>5</sup> 19 Barb. 341.

the right to recover on a *quantum meruit*. The claim of damages seems to have been rejected because none could be claimed; not because it was excessive. On a just apportionment under such a contract, if it appeared that the services of the laborer would be more valuable during the time lost by his sickness than during other parts of his term of service, his wages for the time he served should be proportionately less; otherwise the laborer's sickness would not be his but the employer's misfortune. In this case the servant recovered fifty cents a month less than the employer was bound by the contract to pay him. There is an implication that this deduction was deemed wrong in the allusion of Balcom, J., to this case in *Clark v. Gilbert*.<sup>1</sup> And yet the learned judge, continuing, said: "There is no case which holds [461] that where the full performance of a contract for personal services is prevented by the sickness or death of the party who was to render the services, a greater compensation can be recovered than the stipulated value on proof that the services were worth more than such value. But there are decisions that the recovery in such a case cannot exceed the contract price or the rate of it for the service performed."<sup>2</sup> This apportionment should be so made that all loss which must result from the contract not being fully performed will fall on the party whose misfortune caused it, or by whose sickness or other providential disability its complete performance has been prevented. In other words, the compensation for part performance should be determined on the basis of the benefit of it to the employer, regarding the obligation and consideration of the whole contract.<sup>3</sup> If a household servant hired for a year or any aliquot portion thereof is hurt or temporarily disabled, or falls sick whilst doing his master's

<sup>1</sup> 26 N. Y. 233.

<sup>2</sup> *Coe v. Smith*, 4 Ind. 79; *Allen v. McKibbin*, 5 Mich. 449. The doctrine was asserted in *Allen v. McKibbin* that the servant cannot be permitted to gain by his sickness, nor can the employer be permitted to lose by it. See *Walker v. Norton*, 29 Vt. 230.

<sup>3</sup> *Wolfe v. Howes*, 20 N. Y. 197.

In *Nichols v. Coolahan*, 10 Met.

449, there was a hiring by the month for stated wages, including board. After several months' work the laborer became sick and continued so for three weeks. It was held that he was not chargeable for board nor entitled to wages during that time.

In *Fahy v. North*, *supra*, the employee was charged for his care and board while sick.



business, the latter is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work; but if he has been struck down with disease and permanently disabled, so that he can never be expected to resume work, the contract is dissolved, and the master may dismiss him.<sup>1</sup>

§ 689. **Same subject.** In contracts for personal services for a stipulated time, whether for manual labor or where skill is required or confidence reposed, the performance can be only by the very person employed. In such cases the contract is [462] understood to be on the condition that health and life continue; and, therefore, when inability from such causes arises to commence or continue in the employment performance is excused, and for any work done there may be a recovery on a *quantum meruit*.<sup>2</sup> The justice and reason of this rule are clearly and forcibly explained by Storrs, J.:<sup>3</sup> "It is difficult to reconcile the reported cases on the subject of the liability of an employer of a person who is hired to labor for a specified time on wages to be paid at the expiration of that time, where such person has, without his fault, failed to labor for the whole time; or to extract from them any defined rule. There is much confusion in them which seems to have arisen from the different views entertained by the courts on the question whether such contract of hiring is to be governed by the principle which prevails in regard to a contract to do a specific piece of work, as to build a house or a machine, for a particular sum; in which case the contract is held to be entire, and the performance of it a condition precedent to any right of action against the employer, and the non-fulfillment of it is not excused by inevitable necessity. We do not propose to examine those cases in detail. In the earliest of them it was established that the same principle applied to both of these species of contracts, and that, therefore, where the service of

<sup>1</sup> 2 Add. on Cont., § 894; *Rex v. Sudbrooke*, 1 Smith, 59; *Chandler v. Grieves*, 2 H. Bl. 606, n.; *Cuckson v. Stones*, 1 Ell. & Ell. 248; 28 L. J. (Q. B.) 25.

<sup>2</sup> *Dickey v. Linscott*, 20 Me. 453; *Lakeman v. Pollard*, 43 id. 463; *Wolfe v. Howes*, 20 N. Y. 197; *Ryan v. Dayton*, 25 Conn. 188; *People v.*

*Manning*, 8 Cow. 297; *Gray v. Murray*, 3 Johns. Ch. 167; *Dexter v. Norton*, 47 N. Y. 62; *Robinson v. Davison*, L. R. 6 Exch. 268; *Boast v. Frith*, L. R. 4 C. P. 1; *Spalding v. Rosa*, 71 N. Y. 40; *Story on Bailm.*, § 36, and notes.

<sup>3</sup> *Ryan v. Dayton*, *supra*.

a person hired to labor for a specified time ceased within that time, there could be no apportionment of wages for the actual time of service, and, consequently, no recovery for the services rendered within that time. But this rigid and unreasonable rule has recently been relaxed, and it is now generally, if not universally, held that wages may in particular cases be apportioned; which, in our judgment, is much more in accordance with the true character of such a contract, the presumed intention of the parties and the demands of justice. A contract of this kind is for the personal services of the individual who is hired, and cannot be performed by the agency of another person, and in this important respect is peculiar and different from a contract by which one agrees to do a particular piece of work, as, for instance, to build a house, which may be performed through another person. It is unreasonable to suppose that the parties in such an agreement as the former, knowing that the person hired is liable to be interrupted in his labor by the act of God or inevitable necessity, intended or expected, although there should be no express stipulation on the subject, that he should, in such an event, not only lose his services, but, as the case might be, be bound to repay his employer what he has received in payment for them. And it is obvious that the rule which would subject him to these consequences would be not only harsh but unjust. Viewing the present as a contract for the personal services of the plaintiff, and which could only be performed by himself, we think that from its nature a condition was impliedly attached to it that an inability to labor during a part of the time stipulated, produced by inevitable necessity, should so far constitute an excuse for not laboring during that period that he should not be deprived of a right to a reasonable compensation for the service performed by him under it; and that the rule that where a person by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, which, properly understood, we do not impugn is not applicable to such a contract.<sup>1</sup> In regard to a contract of this kind

<sup>1</sup> 1 Coke, 98; Williams v. Hider, 10 C. & F., 472; Nash v. Ashton, 10 C. & F., 548; 1 Shep. Touch. 180; Gilb. Skin. 42.

we are induced to adopt as the most suitable and just general rule in a case where the servant leaves the service before the end of the time for which he was hired, the one laid down by Chancellor Kent,<sup>1</sup> that unless he so leaves without reasonable cause or is dismissed for such misconduct as justifies the dismissal, he does not forfeit a right to his wages for the period for which he has served. It should be observed, however, that we do not intend to say that in such a case he would be entitled to a proportional part of the sum agreed to be paid for the whole time; and that it should not be reduced so as to [464] indemnify the employer for the loss which he has sustained by the non-fulfillment of the agreement."

The reasons which require that the servant shall be excused from a full performance when it is prevented by the act of God also demand that the employer shall be relieved from liability under the like circumstances. Hence a contract to work as a farm laborer for one year is terminated by the death of the employer, and the servant cannot recover from the executrix of the decedent for services performed thereafter, there being no new contract of hiring.<sup>2</sup>

§ 690. **Same subject.** Where the right to quit at pleasure is reserved in the contract of hiring, but it is stipulated that such quitting shall be preceded by notice, a sudden going away, without notice, in consequence of sickness, will not work a forfeiture of wages already earned. The stipulation for notice will be construed to apply to a voluntary leaving.<sup>3</sup> And the same rule was applied where the party hired stopped work before his time expired because he was arrested and convicted of a crime. The court say: "The stipulation [requiring two weeks' notice of intention to leave] evidently had reference only to a voluntary abandonment of the defendant's

<sup>1</sup> 2 Com. 258-9.

<sup>2</sup> Lacy v. Getman, 119 N. Y. 109.

<sup>3</sup> Fuller v. Brown, 11 Met. 440.

It was held in *Hunt v. Otis Co.*, 4 Met. 464, that where one hires with no express agreement to continue in the service for any definite time, but with knowledge of a regulation adopted by the employers requiring all persons employed by them to give

four weeks' notice of the intention to quit, he does not forfeit his wages by quitting without giving the notice, but he is liable for all damages caused by not giving it; and these may be deducted from the wages in a suit therefor. See *Harrington v. Fall R. Iron Works Co.*, 119 Mass. 82; *Preston v. American Linen Co.*, *id.* 100.

service, and not to one caused *vis major*, whether by visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it. He could give notice only of such departure as he could anticipate, . . . and when it was within his power to give the notice. . . . The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages the abandonment of the employer's service must be the direct, voluntary act or the natural consequence of some voluntary act of the person employed, or of some act committed by him with a design to terminate the contract or employment or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was to cause the termination of the employment of a party under a contract for services or labor."<sup>1</sup> In a Vermont case the court held that in contracts for [465] labor, where the plaintiff is not guilty of a wilful deviation from their terms, but has failed to fulfill them, and has performed work and labor beneficial to the employer, he is entitled to recover under the general counts for work and labor; that the true rule of damages in such case is to allow for the labor according to the contract price, deducting whatever damages the employer has sustained in consequence of the work not being done according to the terms of the contract.<sup>2</sup> In *Wolfe v. Howes*<sup>3</sup> Allen, J., said: "There is good reason for the distinction which seems to obtain in all cases between the case of a wilful or negligent violation of a contract and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially, and without fault on his part, prevented from a full performance."

<sup>1</sup> *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Millot v. Lovett*, 2 Dane's Abr. 461.

<sup>2</sup> *Blood v. Enos*, 12 Vt. 625.

<sup>3</sup> 20 N. Y. 201.



This relaxation of the rule requiring full performance as a precedent condition of an entire contract where disability by sickness intervenes, or there is other involuntary prevention, shows that the rule is technical, and does not in truth rest on the principle that there can exist no legal obligation to pay except on the express terms of the contract. Full performance is not excused in such a case on the ground that it has become impossible; nor on the ground that the employer has done some act to evince an acceptance of the benefit of part performance after default, so as to subject him to the duty of paying independently of his special undertaking in the contract. Neither is the rule founded on the principle that the parties intended, except in the sense of a penalty,<sup>1</sup> that beneficial part performance should not be compensated; otherwise there could be no exception when default is involuntary, as where caused by sickness or death; for no party to a contract is obliged to pay another party merely because of his disability or misfortune. The loss of wages earned for failure of complete performance is treated as in some sort a penalty, but a wholesome one, to secure a faithful execution of contracts. When, therefore, there is an earnest and *bona fide* endeavor to fulfill, frustrated by sickness or other similar cause, the penalty is taken off, and the employee is then entitled to recover on a *quantum meruit*. The rule against an implied, where there is an express, promise does not apply: an exception is admitted. And this exception being based on equitable grounds, it ought to embrace, but does not, all cases where the injured party would otherwise receive a benefit from part performance beyond his actual injury. A defaulting party should not be compelled to pay damages by one

<sup>1</sup> The cases very generally treat the loss of wages earned in consequence of a failure to fulfill the entire contract as a forfeiture, and hence the right to them will become absolute by mere waiver of the forfeiture. Thus in *Patnote v. Sanders*, 41 Vt. 66, a laborer left his employer before the term of service expired, without consent or cause. The employer, although insisting that he did not admit his liability by offering to pay

the laborer for his service at the rate he would have received if he had labored until the end of the time agreed upon, or making a tender of the amount due at that rate, was held to have waived thereby the forfeiture of the wages for the services performed. See *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Boyle v. Parker*, 46 Vt. 343; *Wolfe v. Howes*, 20 N. Y. 197.

measure when he fails to perform a condition precedent and is plaintiff, and another when he commits a breach of an independent stipulation of the same import and is sued upon it. There is no essential difference between a penalty stipulated to be paid if a condition of defeasance is not performed and a penalty in a sum withheld. In the former case, in equity as well as at law, the obligor is relieved from paying more than the actual damage the injured party has suffered from the deficient performance of the condition. Why should he be permitted to retain, in the other case, what is equally penalty but happens to be in his hands?<sup>1</sup>

In several states recovery on a *quantum meruit* may be had for part performance of an entire contract, though there be no cause or excuse for its abandonment, if such performance is beneficial; and on the basis of the contract price after deducting the damages resulting from the failure to perform in full.<sup>2</sup> But an action cannot be brought to recover on a *quantum meruit* until the time when the wages would be [467] due if the contract had been performed.<sup>3</sup> Where the contract of hiring is for a term, but each party reserves the privilege of putting an end to it when he pleases, the servant is entitled to recover at the stipulated rate for the time he serves although he quits upon his own motion.<sup>4</sup> Nor is a person hired by the day to work upon a particular job required to prolong his services to complete a piece of work he has undertaken, or upon which he may happen to be employed, unless he has restricted himself by his contract.<sup>5</sup> An infant will not be sub-

<sup>1</sup> See *Richardson v. Woehler*, 26 Mich. 90; *Dover v. Plemmons*, 10 Ired. 23; *Eaken v. Harrison*, 4 McCord, 142;

<sup>2</sup> *Britton v. Turner*, 6 N. H. 481; *Byrd v. Byrd*, id. 141; *Lincoln v. Page v. Marsh*, 36 id. 305; *Powers v. Schwartz*, 70 Ill. 134; *Dobbins v. Wilson*, 47 Iowa, 666; *Barr v. Van Higgins*, 78 id. 440.

<sup>3</sup> *Hartwell v. Jewett*, 9 N. H. 249; *Bailey v. Wood*, 17 id. 365; *Thompson v. Phelan*, 22 id. 339; *Davis v. Carroll v. Welch*, 26 Tex. 147; *Riggs v. Horde*, Suppl. to 25 Tex. 456; *Coe v. Barrington*, 30 id. 517. See *Knutson v. Smith*, 4 Ind. 82; *Ricks v. Yates*, 5 id. 115; *Downey v. Burk*, 23 Mo. 228; *Wilson v. Adams*, 15 Tex. 323; *Robinson v. Sanders*, 24 Miss. 391; *Hariston v. Sale*, 6 Sm. & M. 634; *Steed v. Knapp*, 35 Wis. 86.

<sup>4</sup> *Evans v. Bennett*, 7 Wis. 404; *Steed v. McRae*, 1 Dev. & Bat. 435; *Coxe v. Skeen*, 3 Ired. 443; *Craig v. Pride*, 2 Spear, 121.

<sup>5</sup> *Wyngert v. Norton*, 4 Mich. 286.

jected to the loss of what he has earned by failing to fulfill an entire contract for service.<sup>1</sup> But if during the term for which he has engaged himself he becomes of age, and continues thereafter to work, he thereby affirms the contract and must abide by it.<sup>2</sup>

[468] § 691. **Entire and apportionable contracts.** There can be no forfeiture of wages under the rigorous rule which has been stated, unless there is a failure to perform some stipulated service which as a whole is a condition precedent. Whether a contract is entire does not depend on any formal arrangement of the words, but on the intention of the parties as it is collected from the whole of it.<sup>3</sup> Contracts are entire when it is the intention that service for a specified period, or some stipulated service or work, shall be entirely performed before any part of the consideration or wages can be demanded, and then that they are to be paid in one sum. A hiring for a year for a specified sum, to be paid when the work has been done, is a plain instance of such a contract.<sup>4</sup> The intention governs, and it is manifest that a year's work is to be performed before any wages are to be paid; nothing short of the agreed sum can be earned; it is a unit of compensation. Where a contract was made to completely repair certain chandeliers for a specified sum, and they were returned in an incomplete state, it was held that an action could not be

<sup>1</sup> Van Pelt v. Corwine, 6 Ind. 363; Mountain v. Fisher, 22 Wis. 93; Dallas v. Hollingsworth, 3 Ind. 537; Davies v. Turton, 13 Wis. 185; Weeks v. Leighton, 5 N. H. 343; Harney v. Owen, 4 Blackf. 337; McCoy v. Huffman, 8 Cow. 84; Stone v. Dennison, 13 Pick. 1; Badger v. Phinney, 15 Mass. 359; Holmes v. Blogg, 8 Taunt. 508; Dunton v. Brown, 31 Mich. 182.  
<sup>2</sup> Forsyth v. Hastings, 27 Vt. 646.  
<sup>3</sup> Ritchie v. Atkinson, 10 East, 295; More v. Bonnet, 40 Cal. 251.  
<sup>4</sup> Stark v. Parker, 2 Pick. 267; Olmstead v. Beale, 19 id. 528; Davis v. Maxwell, 12 Met. 286; Ewing v. Ingram, 24 N. J. L. 520; Cranmer v. Graham, 1 Blackf. 406; Jewell v. Thompson, 2 Litt. 52.

<sup>1</sup> Van Pelt v. Corwine, 6 Ind. 363; Wheatly v. Miscal, 5 Ind. 142; Lufkin v. Mayall, 25 N. H. 82; Nickerson v. Easton, 12 Pick. 110; Vent v. Osgood, 19 Pick. 572; Judkins v. Walker, 17 Me. 38; Lowe v. Sinklear, 27 Mo. 308; Thomas v. Dike, 11 Vt. 273; Hoxie v. Lincoln, 25 Vt. 206; Millard v. Hewlett, 19 Wend. 301; Medbury v. Watrous, 7 Hill, 110; Gaffney v. Hayden, 110 Mass. 137; Ray v. Haines, 52 Ill. 485; Whitmarsh v. Hall, 3 Denio, 375; Derocher v. Continental Mills, 58 Me. 217; Moses v. Stevens, 2 Pick. 332; Garner v. Board, 27 Ind. 323. See De France v. Austin, 9 Pa. St. 309; Taft v. Pike, 14 Vt. 405;

maintained for what had actually been done.<sup>1</sup> So where an attorney covenanted to pay a clerk 2s. for every quire of paper he copied, the contract was held entire as to each quire, and there could be no recovery for copying any less number of sheets.<sup>3</sup> The contract of an attorney to carry a suit to its termination is an entire one; and he cannot recover for doing a part of this service and then abandoning the case, unless he is able to put the client in fault.<sup>4</sup>

If the consideration is in its nature apportionable, as where it is money, and the stipulated service is to be continuous for a considerable period, or consists of a series of distinct acts, and there is no entire sum to be paid for all, nor anything in the contract inconsistent with a demand of payment as the work progresses, on part performance there may be a [469] recovery for what is done.<sup>5</sup> Thus, where a shipwright agreed to put a ship into thorough repair, but there was no stipulation as to the time or mode of payment, it was held that he might sue for payment *pro tanto* when part of the work had been done.<sup>6</sup> And where a party contracted to carry to market three kinds of lumber for different prices, and the contract was silent as to the time of payment, it was not deemed entire; delivery of the whole at market was not a condition precedent to the payment of freight, but it became due and was demandable as fast as the lumber was delivered.<sup>7</sup>

The question in every case is whether the intention of the parties was that the compensation should depend upon full performance and it is so expressed in the contract. Where such intention would seem contrary to the equity of the case, courts ought to require that it should be clearly expressed before they enforce it.<sup>8</sup> If an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each being considered

<sup>1</sup> Sinclair v. Bowles, 4 Man. & R. 3; 9 B. & C. 94.

<sup>2</sup> Needler v. Guest, Aleyn, 9.

<sup>3</sup> Harris v. Osbourn, 2 Crompt. & M. 629; Vansandan v. Browne, 9 Bing. 402; Nicholls v. Wilson, 11 M. & W. 106.

<sup>5</sup> Taylor v. Laird, 1 H. & N. 266; Perkins v. Hart, 11 Wheat. 237.

<sup>6</sup> Roberts v. Havelock, 3 B. & Ad. 404.

<sup>7</sup> Dunn v. Daly, 78 Cal. 640; Sickels v. Pattison, 14 Wend. 257; Ritchie v. Atkinson, 10 East, 295; Robinson v. Green, 3 Met. 159.

<sup>8</sup> Leonard v. Dyer, 26 Conn. 177.



as forming the matter of a separate agreement after it is so closed.<sup>1</sup> And this is more obviously so where the service or other thing to be done consists of distinct periods or parts, and a separate sum is agreed to be paid for each. Thus an agreement to deliver straw at the rate of three loads in a fortnight for a specified period, at a stated price per load, was silent as to the time of payment; it was held that the party delivering was entitled to demand payment on the delivery of each load.<sup>2</sup> But even where the compensation is by the contract to be computed at so much per month, or on some other detail, the intention may be found that the promise shall be deemed entire on one side, based on an entire consideration on the other. Where a plaintiff undertook to cure a flock of [470] sheep and lambs at so much per head for the sheep and so much for the lambs, and not to be paid anything unless he cured all, it was held there could be no recovery for any partial performance.<sup>3</sup> So where a party agreed to work ten and a half months to spin yarn at three cents per run, and there was no stipulation as to the time of payment, in an action for spinning eight hundred and forty-five runs at three cents per run, he having worked only a part of the time, it was held that the contract was entire for the whole period of ten and a half months, and performance for it a condition precedent; therefore the action could not be maintained.<sup>4</sup>

It seems generally to have been considered that a contract of hiring for a year, or a less time, for so much per month, per week or per day, silent as to the time of payment, is entire, and the wages only payable on the services being rendered for the whole time.<sup>5</sup> Hubbard, J., speaking of such a contract, said: <sup>6</sup> "There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain;

<sup>1</sup> Perkins v. Hart, 11 Wheat. 237.

<sup>2</sup> Withers v. Reynolds, 2 B. & Ad. 882; More v. Bonnet, 40 Cal. 251.

<sup>3</sup> Bates v. Hudson, 6 Dowl. & R. 3.

<sup>4</sup> McMillan v. Vanderlip, 12 Johns. 165.

<sup>5</sup> Decamp v. Stevens, 4 Blackf. 24; Monell v. Burns, 4 Denio, 121; Lantry v. Parks, 8 Cow. 63; Hansell v.

Erickson, 28 Ill. 257; Swanzy v. Moore, 22 Ill. 63; Davis v. Maxwell, 12 Met. 286; Olmstead v. Beale, 19 Pick. 528; Thayer v. Wadsworth, id. 349; Winn v. Southgate, 17 Vt. 355; Reab v. Moor, 19 Johns. 337; Larkin v. Buck, 11 Ohio St. 561; Thorpe v. White, 13 Johns. 53.

<sup>6</sup> Davis v. Maxwell, *supra*.

performance on one part and payment on the other, and not part performance and full payment for the part performed." The cases are numerous and harmonious enough to establish this as the proper construction of this class of contracts; but it is to be observed that this construction is based more upon the policy of the rule than the intention of the parties. The amount earned can be ascertained under the contract from time to time, and in the absence of any promise to pay for the whole service in one sum at the end of the stipulated period, there would seem to be no legal impediment to a demand of instalments of wages as the benefit accrues therefrom; there is a general expectation of such payments, and a need of them.<sup>1</sup> Where wages are payable by instalments in the ratio of [471] part performance while the work is in progress, these may be recovered as they fall due, although there is a hiring for a definite term; and if the work is abandoned without serving the full term, there can be no loss of any which is completely earned and due. There can be no recovery for an unfinished wages-period.<sup>2</sup>

**§ 692. Wrongful dismissal of employee.** Where the employer prevents the servant from performing his contract the latter is entitled to recover wages for the time he has served whether the contract is entire for a longer period or not, and whether the prevention is by wrongfully discharging him, or by giving him sufficient cause to quit work of his own motion.<sup>3</sup> He is entitled to damages for the wrongful dismissal without cause before the expiration of the term for which he was employed.<sup>4</sup> The same rule applies when no services are per-

<sup>1</sup> See 2 Smith's Lead. C. [\*47].

In *Thorpe v. White*, 13 Johns. 53, it was held that where there is a contract of hiring for a definite period at a certain rate per day, and a part only of the time having elapsed, the parties settle the amount of the wages which had then been earned, and the hirer gives his note to the servant for the amount, in an action on the note it is no defense that the payee had left the maker's service before the expiration of the time for which he had been originally hired; although,

had there been no subsequent modification of the agreement, he could not have recovered wages until he had served the whole period agreed upon.

<sup>2</sup> *Cunningham v. Morrell*, 10 Johns. 203; *Hamlin v. Race*, 78 Ill. 422; *Hartman v. Rogers*, 69 Cal. 643; *Beach v. Mullin*, 34 N. J. L. 343.

<sup>3</sup> *Gates v. Davenport*, 29 Barb. 160; *Bull v. Schuberth*, 2 Md. 57; *Congregation of Children of Israel v. Peres*, 2 Cold. 620.

<sup>4</sup> *Pritchard v. Martin*, 27 Miss. 305;

formed on account of the employer's wrongful conduct; if he puts it out of the employee's power to perform the latter need not make an offer.<sup>1</sup> But the damages will not be substantial where the employment is for such time as the employee may elect to serve unless he makes his election before or at the time of his discharge.<sup>2</sup> If his time is subject to the employer's will the recovery will not be diminished by allowing compensation for such time only as he may have given to the performance of his duties.<sup>3</sup>

For the services actually rendered by the employee he may recover on a *quantum meruit*, treating the contract as rescinded on being discharged, or departing for good cause;<sup>4</sup> or he may sue on the contract and recover damages, including the wages earned, to the amount of the actual loss sustained.<sup>5</sup> But he cannot have both remedies. After treating the contract [472] as in force by bringing an action upon it for damages for a wrongful discharge, he cannot recover in general *assumpsit* for services actually rendered.<sup>6</sup> And either action may be brought immediately. In the special action, however, there might be a disadvantage in its being brought before the expiration of the term of employment. The full damages for that term cannot be assessed in advance. This was strikingly illustrated in a Wisconsin case. The plaintiff had been employed at an annual salary of \$2,000 to act as superintendent of a lumbering establishment for five years. He was dis-

Brinkley v. Swicegood, 65 N. C. 626; Adams v. Pugh, 7 Cal. 150; Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630; Prentiss v. Ledyard, 28 id. 131; Roberts v. Crowley, 81 Ga. 429; Alberts v. Stearns, 50 Mich. 349.

<sup>1</sup> Brown v. Board of Education, 29 Ill. App. 572.

<sup>2</sup> Bolles v. Sachs, 37 Minn. 315.

<sup>3</sup> Stevens v. Crane, 37 Mo. App. 487.

<sup>4</sup> Brinkley v. Swicegood, 65 N. C. 626; Bull v. Schuberth, 2 Md. 57; Given v. Charron, 15 Md. 502; Hartman v. Rogers, 69 Cal. 643.

Interest is not recoverable anterior to verdict or judgment. Cox v. McLaughlin, 76 Cal. 60.

<sup>5</sup> Pritchard v. Martin, 27 Miss. 305; Stewart v. Walker, 14 Pa. St. 293; Willoughby v. Thomas, 24 Gratt. 521; Hunt v. Crane, 33 Miss. 669; Walworth v. Pool, 9 Ark. 394; Fowler v. Waller, 25 Tex. 695; Saxonia Mining & R. Co. v. Cook, 7 Colo. 569; Richardson v. Eagle Machine Works, 78 Ind. 422; Nixon v. Myers, 141 Pa. St. 477.

<sup>6</sup> Richardson v. Eagle Machine Works, 78 Ind. 422; Goodman v. Pocock, 15 Q. B. 576; Colburn v. Woodworth, 31 Barb. 381. See Watts v. Todd, 1 McMull. 26; Blun v. Holitzer, 53 Ga. 82.

charged at the end of the first year, and then brought suit to recover damages in respect to the remaining four years. He had found other employment for one year at a salary of \$1,000, and the trial having taken place while he was performing this engagement, the trial court proceeded on the presumption, as a legal one, that the state of facts existing at the time of the trial would continue through the ensuing years to the end of the contract term, and a verdict for \$4,000 was found in favor of the plaintiff. This was set aside on appeal on the ground that there could be no such presumption. Cole, J., said: "In any business the price of labor fluctuates greatly within four years; particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year \$500, and so on, would it not be unjust to say he should only recover according to the rule adopted by the jury in this case. Or suppose the value of the labor should rise so that he could obtain for his services \$2,000 or \$2,500 a year, what then would be his loss for the failure of the appellant to fulfill his contract? Still further difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? . . . As the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime."<sup>1</sup> But this rule does not prevail in some states. On a wrongful dismissal the employee must recover full damages in one suit, though it be brought before the expiration of the term of service.<sup>2</sup>

<sup>1</sup> Gordon v. Brewster, 7 Wis. 355; Co. v. Bryson, 44 Iowa, 159; Lewis Wright v. Falkner, 37 Ala. 274; Fowler v. Armour, 24 id. 194; Pritchard v. Martin, 27 Miss. 305; Saxonia Mining & R. Co. v. Cook, 7 Colo. 569; Mt. Hope C. Ass'n v. Weidenman, — Ill. —; 28 N. E. Rep. 834; Wilson S. M. Co. v. Sloan, 50 Iowa, 367. See Hartland v. General Exchange Bank, 14 L. T. (N. S.) 863; Alfaro v. Davidson, 40 N. Y. Super. Ct. 87; Gifford v. Waters, 67 N. Y. 80; Howe Machine Co. v. Bryson, 44 Iowa, 159; Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534; Washburn v. Hubbard, 6 Lans. 11.

<sup>2</sup> Tarbox v. Hartenstein, 4 Baxter, 78; E. T., Va. & Ga. R. Co. v. Staub, 7 Lea, 397; Litchenstein v. Brooks, 75 Texas, 196; James v. Allen Co., 44 Ohio St. 226; Everson v. Powers, 89 N. Y. 527 (it seems); Sutherland v. Wyer, 67 Me. 64; Ætna L. Ins. Co. v. Nexsen, 84 Ind. 347.



[473] § 693. **Same subject.** Where the action is not tried until the period of the stipulated service has expired, the plaintiff will be entitled to recover the agreed wages or salary for the whole time, but reduced by the amount which he has or might have earned by engaging to any other party during the time of the breach.<sup>1</sup> This is not the rule, however, where a school teacher has been wrongfully discharged by the local authorities, and such action has been reversed by competent authority. In that case there is no legal obstacle in the way of his performance of the contract, and he must at least offer to perform in order to recover compensation subsequent to the reversal.<sup>2</sup> Where there has been a wrongful discharge of an employee it is his duty to diligently endeavor to find other employment during the time for which he claims damages from the defendant. This is required because the law discourages idleness, and on the principle that it is the duty of the injured party to reasonably exert himself to prevent or diminish damages arising from the acts of the defendant.<sup>3</sup>

<sup>1</sup> *Holloway v. Talbot*, 70 Ala. 389; 38 Cal. 659; *Jaffray v. King*, 34 Md. Everson v. Powers, 89 N. Y. 527; 217; *Cumberland, etc. R. Co. v. Slack*, 45 id. 161; *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609.

*In Yerrington v. Greene*, 7 R. I. 589, it was held that the death of the employer, who had retained a clerk and salesman in his business for three years, occurring before the expiration of that term, excused the further performance of the contract, and that no action could be maintained against the administrators of the employer for their refusal longer to employ such clerk. *Lacy v. Getman*, 119 N. Y. 109.

<sup>2</sup> *Park v. Independent School District*, 65 Iowa, 209.

<sup>3</sup> *Miller v. Marine's Church*, 7 Me. 51; *Jones v. Jones*, 4 Md. 609; *Chamberlain v. Morgan*, 68 Pa. St. 168; *Sutherland v. Wyer*, 67 Me. 64; *Howard v. Daly*, 61 N. Y. 362; *Ben-ziger v. Miller*, 50 Ala. 206; *Baker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Shannon v. Comstock*, 21 Wend.

*Holloway v. Talbot*, 70 Ala. 389; *Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Prentiss v. Ledyard*, 28 id. 131; *Congregation of Children of Israel v. Peres*, 2 Cold. 620; *Decker v. Hassel*, 26 How. Pr. 528; *Blun v. Holitzer*, 53 Ga. 82; *Fereira v. Sayres*, 5 W. & S. 210; *Algeo v. Algeo*, 10 S. & R. 235; *McDaniel v. Parks*, 19 Ark. 671; *Whitaker v. Sandifer*, 1 Duv. 261; *Colburn v. Woodworth*, 31 Barb. 381; *Shannon v. Comstock*, 21 Wend. 457; *Byrd v. Byrd*, 4 McCord, 141; *Squire v. Wright*, 1 Mo. App. 172; *Sprague v. Morgan*, 7 Ala. 952; *Davis v. Ayres*, 9 id. 292; *Fowler v. Armour*, 24 id. 194; *Martin v. Everett*, 11 id. 375; *Ramey v. Holcombe*, 21 id. 567; *Bromley v. School District*, 47 Vt. 381; *Howard v. Daly*, 61 N. Y. 362; *Hendrickson v. Anderson*, 5 Jones' L. 246; *Williams v. Anderson*, 9 Minn. 50; *Horn v. Western Land Ass'n*, 22 id. 233; *Walworth v. Pool*, 9 Ark. 394; *Utter v. Chapman*,

The opportunity to be employed by another will not, however, be presumed, but must be affirmatively shown by the defendant. While the rule here is the same as in other cases that compensation is limited to the actual injury, and [474] this is deemed to be only the difference between the wages stipulated to be paid by the defendant and the amount the plaintiff by diligence can obtain for like service elsewhere, yet the burden is on the defendant to show the latter amount; otherwise the damages will be measured by the salary or wages agreed to be paid.<sup>1</sup> The plaintiff is not required to diminish the damages measured by the agreed wages by engaging in a different business;<sup>2</sup> nor, it has been held, at a different place.<sup>3</sup> If, however, compensation is received for services rendered in a dissimilar employment, the damages are lessened correspondingly.<sup>4</sup> The employee is not bound to accept service of the employer who has wrongfully discharged him at less wages than the original contract stipulated for, because to do so would be a modification of that contract and a waiver of the right to claim under it. The rejection of such an offer neither prejudices the employee's right of action

457; *Hecksher v. McCrea*, 24 id. 300; *Walworth v. Pool*, 9 Ark. 394; *Polk v. Daly*, 14 Abb. (N. S.) 156; vol. 1, § 88.

<sup>1</sup> *Dunn v. Daly*, 78 Cal. 640; *Brown v. Board of Education*, 29 Ill. App. 572; *School Directors v. Kimmel*, 31 id. 537; *Miller v. Boot & Shoe Co.*, 26 Mo. App. 57; *Koenigkraemer v. Missouri Glass Co.*, 24 id. 124; *Saxonia Mining & R. Co. v. Cook*, 7 Colo. 569; *Ansley v. Jordan*, 61 Ga. 482; *Roberts v. Crowley*, 81 id. 429; *Hinchliffe v. Koontz*, 121 Ind. 422; *Larkin v. Hecksher*, 51 N. J. L. 133; *Fee v. Orient Fertilizing Co.*, 36 Fed. Rep. 509; *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609; *Howard v. Daly*, 61 N. Y. 362; *Gillis v. Space*, 63 Barb. 177; *King v. Sturer*, 44 Pa. St. 99; *Chamberlain v. Morgan*, 68 Pa. St. 168. See *Gazette Printing Co. v. Morss*, 60 Ind.

153; *Williams v. Chicago Coal Co.*, 60 Ill. 149.

In some states it is held that the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize. *Hunt v. Crane*, 33 Miss. 669; *Fowler v. Waller*, 25 Texas, 695; *McDaniel v. Parks*, 19 Ark. 671; *Huntington v. Ogdensburgh, etc. R. Co.*, 33 How. Pr. 416. See *Whitaker v. Sandifer*, 1 Duv. 261; *Willoughby v. Thomas*, 24 Gratt. 521.

<sup>2</sup> *Id.*; *Strauss v. Meertief*, 64 Ala. 299; *Holloway v. Talbot*, 70 id. 389; *Fuchs v. Koerner*, 107 N. Y. 529. But see *Perry v. Simpson Waterproof Co.*, 37 Conn. 520.

<sup>3</sup> *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609.

<sup>4</sup> *Stevens v. Crane*, 37 Mo. App. 487.

nor affects the amount he may recover.<sup>1</sup> But an offer to continue in the same employment under the terms of the original contract, if nothing has occurred to make it degrading for the employee to do so, or he will not suffer loss or injury thereby, must be accepted; if it is refused he cannot recover for such time as he thereafter remains unemployed.<sup>2</sup> If the dismissed employee fails to secure other employment and goes to work for himself it is held in Michigan that the value of his services is not to be deducted from his claim against his former employer.<sup>3</sup> There is, however, a New York supreme court decision to the contrary.<sup>4</sup>

It has been supposed that the right to recover at the rate of the stipulated wages rests upon the fact that the service is personal, and therefore during the term the employee keeps or should keep himself in readiness actually to do the stipulated work, and is not required or at liberty to enter into any engagement inconsistent with his duties under the contract sued upon.<sup>5</sup> Where the party employed stipulated to cause certain services to be performed, and was not expected or required to render them in person, and they were to be performed for a stated period for a stipulated sum, it was held that the contract was assimilated to an agreement for particular work to be performed or materials to be furnished; that the damages for the employer's breach would be the difference between the cost of the work and the amount agreed to be paid; that the employee was entitled to a *pro rata* compensation according to the terms of the contract for the time he had performed and had not been paid, and for the profits which he could have made during the residue of the time the contract had to run.<sup>6</sup>

[475] § 694. Same subject. The damages recovered are not wages for constructive services, but compensation for being

<sup>1</sup> People's Co-operative Ass'n v. Lloyd, 77 Ala. 387; Whitmarsh v. Littlefield, 46 Hun, 418.

<sup>2</sup> Birdsong v. Ellis, 62 Miss. 418; Saunders v. Anderson, 2 Hill (S. C.), 486; Bigelow v. American F. P. Manuf. Co., 39 Hun, 599; Beymer v. McBride, 37 Iowa, 114.

<sup>3</sup> Harrington v. Gies, 45 Mich. 374.

<sup>4</sup> Huntington v. Ogdensburgh, etc. R. Co., 33 How. Pr. 416.

<sup>5</sup> Jaffray v. King, 34 Md. 217.

<sup>6</sup> Ramey v. Holcombe, 21 Ala. 567. See Shannon v. Comstock, 21 Wend.

prevented from earning the stipulated wages according to the contract. If at the beginning of the period hired for the employer refuses to take the person employed into his service, or afterwards, before the end of that period, wrongfully discharges him, there is no further duty on his part to be in readiness to perform; or to decline any engagement which would have been incompatible if the other party had kept his agreement.<sup>1</sup> The employer's violation of his contract to employ for a specified time or service has sometimes given a right to other damages than an equivalent for the direct wages or salary thus prevented from being earned. Thus, the defendant, residing in New Hampshire, by letter proposed to the plaintiff, who was residing in Minnesota, that if he would come to New Boston he might move into the defendant's house; that he would give the plaintiff and his wife a year's board; and he might carry on the defendant's farm on any terms he might elect; the plaintiff, accepting the offer, moved there, and an arrangement for carrying on the farm was made. On a breach of this contract by refusing to allow him to enter upon its performance, it was held that in assessing the damages the jury might take into consideration the expenses of such removal, which were treated as part of the consideration paid by the plaintiff, and distinctly contemplated by the parties.<sup>2</sup> It is material that such expenses be incurred in consequence of the contract, and be contemplated when it is made.<sup>3</sup> [476] Where the defendant, doing business in Massachusetts, wrote

<sup>1</sup> Howard v. Daly, 61 N. Y. 362; Moody v. Leverich, 14 Abb. (N. S.) 145; Sutherland v. Wyer, 67 Me. 64; <sup>2</sup> Parsons on Cont. 40 and note. See Shaw v. Republic Ins. Co., 69 N. Y. 286; Beckwith v. Baldwin, 12 Ala. 720; also Williams v. Anderson, 9 Minn. 50.

<sup>2</sup> Woodbury v. Jones, 44 N. H. 206; Cadman v. Markle, 76 Mich. 448.

<sup>3</sup> Benziger v. Miller, 50 Ala. 206.

In Johnson v. Arnold, 2 Cush. 46, the defendant agreed with plaintiff, who lived in Massachusetts, to furnish goods to a certain amount to stock a store in Indiana for two

years. The plaintiff was to take charge of the business, and to have half of the net profits. It was held that, in estimating the damages, it was competent for the arbitrators, to whom the case was referred, to allow the plaintiff compensation for the loss of time and expenses of removing his family to and from the agreed place of business, instead of the profits he would probably realize if the business had continued. The breach was the failure of defendant to fulfill his agreement, thus preventing the plaintiff from continuing the business.



to the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year;" and the plaintiff accepted the offer and came, but the defendant refused to employ him, it was held that he was not entitled to recover as part of his damages either his expenses in coming from the Islands, or compensation for the time consumed in the journey.<sup>1</sup> The discharge of a minor in contravention of a contract made with his father entitles the latter to recover for the trouble and expense incurred in obtaining other employment for his son.<sup>2</sup> Where a deed of apprenticeship gave the master the right to discharge for a designated cause on giving a week's notice, and a dismissal was made for another cause without notice, the damages were not restricted to the value of the week's notice, but extended to all that naturally resulted from the breach, including the difficulty the plaintiff had, as a discharged apprentice, in obtaining employment elsewhere.<sup>3</sup> A dismissal was made after four and a half months' service had been rendered under a contract which was to continue for two years, at a fixed salary and one-half the profits. The court refused to set aside a verdict which awarded a year's salary and the stipulated share of the profits for that time.<sup>4</sup> If an auctioneer has incurred expense in cataloguing the goods he has been authorized to sell,<sup>5</sup> or in advertising them and for his license, he may recover it on the revocation of his authority.<sup>6</sup> In a New York supreme court case<sup>7</sup> it was held by Lawrence, J., that one who relies upon a contract giving him the agency for the sale of a proprietary article and gives up his previous profitable employment may on the failure of his employer to perform stipulations essential to success in the undertaking recover as damages the profits lost by withdrawing from his former employment and the expenses incurred in engaging in the new enterprise; the first item to

<sup>1</sup> Noble v. Ames Manuf. Co., 112 Mass. 492. See Peters v. Whitney, 23 Barb. 24; Woodbury v. Brazier, 48 Me. 302.

<sup>2</sup> Dickinson v. Talmage, 138 Mass. 249.

<sup>3</sup> Maw v. Jones, 23 Q. B. Div. 107.

<sup>4</sup> Smith v. Thompson, 8 C. B. 44; S. C., 65 E. C. L. 44.

<sup>5</sup> Carpenter v. Le Count, 22 Hun, 106.

<sup>6</sup> Russell v. Miner, 25 Hun, 114.

<sup>7</sup> Meylert v. Gas Consumers' B. Co., 26 Abb. N. C. 262.

be computed only for the time and to the extent he was unable to follow his previous occupation.

In the consideration of the certainty of damages and profits as damages a number of cases which pass upon the rights of agents to compensation on the basis of commissions on the amount of sales which might have been made but for the principal's wrongful act in terminating their employment have already been considered.<sup>1</sup> The uncertainty which attends all mercantile transactions has generally induced the courts to disallow claims for compensation so far as they are based upon unearned commissions.<sup>2</sup> There are some cases which have allowed such compensation. In a Georgia case an insurance company broke its contract with an agent by increasing its rates for policies to such a figure that he was unable to obtain any risks. He was entitled to recover what he would have earned if the rates had remained as they were fixed by the contract.<sup>3</sup> The commissions due an insurance agent on the renewal of life policies have been held to be computable with sufficient certainty for the purpose of awarding damages.<sup>4</sup>

**§ 695. Liability of employee for violation of contract.** The employee is liable to the employer for violation of his contract of service; and damages therefor may not only be recovered by action, but may be deducted or recouped from the sums due for service in actions for their recovery.<sup>5</sup> Where an overseer, employed at a stipulated sum per annum, was sick a part of the time so as to unfit him for active duty, but was permitted to remain in the service up to the end of the year, he was held entitled to *pro rata* compensation; and it

<sup>1</sup> Vol. 1, § 69.

<sup>2</sup> *Brigham v. Carlisle*, 78 Ala. 243; *Beck v. West*, 83 id. 213; *Stern v. Rosenheim*, 67 Md. 503; *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11; *Howe S. M. Co. v. Bryson*, 44 Iowa, 159.

<sup>3</sup> *Life Association of America v. Ferrill*, 60 Ga. 414. See *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87.

<sup>4</sup> *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

<sup>5</sup> *Alberts v. Stearns*, 50 Mich. 349; *Still v. Hall*, 20 Wend. 51; *Harper v. Ray*, 27 Miss. 622; *Dunlap v. Hand*, 26 id. 460; *Dean v. Warren*, 4 Up. Can. C. P. 423; *Peters v. Craig*, 6 Dana, 307; *Marshall v. Hann*, 17 N. J. L. 425; *Forman v. Miller*, 5 McLean, 218; *Swift v. Harriman*, 30 Vt. 607; *Peters v. Whitney*, 23 Barb. 24. See section on Recoupment and Counterclaim. See *contra*, *N. & K. Turnpike Co. v. Harris*, 8 Humph. 558.

was declared as a general principle that if the employer had been injured by the imperfect performance of the overseer's undertaking damages adequate to the injury should be re-[477]couped.<sup>1</sup> And this kind of defense may be made for unfaithful service against wages in a proceeding to enforce a lien.<sup>2</sup> In an action by the father for the services of his sons, on an answer that they had been engaged for a specific time, and broke their contract, it was held that the defendant had a right to show the damages from such a breach to reduce the recovery.<sup>3</sup> So in an action for work and labor against a manufacturing company, it appearing that the plaintiff was subject to a regulation requiring all persons in the company's employ to give four weeks' notice of their intention to leave the service, and had departed without doing so, it was held that the defendants were entitled to a deduction from the plaintiff's claim of the damages sustained by reason of his breach of the contract.<sup>4</sup> In an action by a factor against his principal to recover a general balance the defendant was allowed to prove in mitigation of damages that the plaintiff had orders to sell the goods consigned immediately, and that they might have been sold in compliance with such order for more than sufficient to put the plaintiff in funds to the amount of his shipments and all costs and charges; and it was held that such a

<sup>1</sup> *Hunter v. Waldron*, 7 Ala. 753; *Jones v. Dyer*, 16 id. 221; *McLane v. Miller*, 12 id. 643; *McCracken v. Hare*, 2 Spear, 256; *Farnsworth v. Garrard*, 1 Camp. 38; *Marshall v. Haun*, 17 N. J. L. 243. In this case it appeared that H. engaged to M. as a glass blower, with a specification of his services, duties and compensation; it was also stipulated that for every wilful neglect or refusal to blow, flatten or do other work customary, etc., the person so neglecting or refusing should pay to M. the sum of \$10. In an action for services, it was held competent for the defendant to show that the services had not been performed in the manner agreed on, and that these penal sums, being in the nature of liqui-

dated damages, might be set off against the plaintiff's claim. See *Spalding v. Vandercook*, 2 Wend. 431.

Where the counter-claim alleged that if an abstract of title had been made in time the defendant would have been enabled to borrow money on his property and with such money would have been able to purchase land for which he was negotiating, which subsequently increased in value to a large extent over what it would have cost him, the claim was held to be for damages which were too remote. *Pendleton v. Cline*, 85 Cal. 142.

<sup>2</sup> *Ward v. Wilson*, 3 Mich. 1.

<sup>3</sup> *Lowen v. Crossman*, 8 Iowa, 325.

<sup>4</sup> *Hunt v. Otis Co.*, 4 Met. 464.

defense would be a bar to all commissions, interest, storage and other charges caused by such negligence and breach of orders.<sup>1</sup>

According to the weight of American authority the employer may obtain by way of recoupment damages, either direct or consequential, estimated by the same standard or measure as by an action for breach of the servant's contract.<sup>2</sup> In an action for the breach of a contract to work on a farm, evidence of damage accruing to plaintiff's crops in consequence of the defendant's leaving his service is inadmissible, the loss being too remote.<sup>3</sup> The employer may set up as a ground of recoupment not only want of diligence or skill, but even the torts of the person employed which involve a breach of duty in his employment. In an action brought upon a promissory note given for work done by the plaintiff for the de- [475] fendants, the defense was permitted by way of recoupment that while the plaintiff was in the defendants' employ as their servant, they were possessed of drawings, plans, models and patterns of steam-engines, etc., which had names, numbers and marks inscribed on them so as to identify them; and that the plaintiff, contrary to his duty as such servant, destroyed the drawings and plans, and obliterated the names, numbers and marks of the plans, models and patterns. The damages, however, were restricted to compensation; it was held that nothing could be allowed on account of the malice with which the wrong was done.<sup>4</sup> It is not a defense to an action for wages

<sup>1</sup> Dodge v. Tileston, 12 Pick. 328; Montrion v. Jefferys, 2 C. & P. 113.

<sup>2</sup> Railroad Co. v. Smith, 21 Wall. 255; Lufburrow v. Henderson, 30 Ga. 482; Ward v. Fellers, 3 Mich. 281; vol. 1, § 188.

<sup>3</sup> Peters v. Whitney, 23 Barb. 24; Riech v. Bolch, 68 Iowa, 526; Prosser v. Jones, 41 id. 674.

There is not sufficient connection between unskilfulness in performing labor by a servant and the loss of the lease of a farm by the employer to make the former liable therefor. Hartman v. Rogers, 69 Cal. 643.

On the breach of a contract to act

as agent for the sale of an article after entering upon the agency the principal elements of the damages sustained by the other party are the expense of procuring another agent and the increased expense of selling the article direct to customers. The fact that the price of the article is reduced is not ground for making the difference in the price before and after the breach the basis of the recovery. Cannon Coal Co. v. Taggart (Colo.), 27 Pac. Rep. 238.

<sup>4</sup> Allaire Works v. Guion, 10 Barb. 55; Brigham v. Hawley, 17 Ill. 38; Lee v. Clements, 48 Ga. 128; Satch-



that the employee has so misconducted himself as to injure a third person, thereby exposing his master to liability for damages, if the latter has not been found liable therefor.<sup>1</sup>

The omission to set up the defense of recoupment was held in one case in England to be a bar to an action for the same matter;<sup>2</sup> but that is not the law in this country. Here matter of recoupment which constitutes a cross-claim for which a separate suit could be brought may be used as a defense or not at the election of the defendant. But if set up in a plea or notice, and the defense offered on the trial, the judgment will be a bar, even though the defense be disallowed.<sup>3</sup>

well v. Williams, 40 Conn. 371;      <sup>2</sup> Kist v. Atkinson, 2 Camp. 63.  
Fowler v. Payne, 49 Miss. 32; Conger      <sup>3</sup> Fabricotti v. Launitz, 3 Sandf.  
v. Fincher, 28 Ill. 347; Wilder v.      743; McLane v. Miller, 12 Ala. 643;  
Stanley, 49 Vt. 105.      vol. 1, § 189.

<sup>1</sup> Merlette v. North & East River S.  
Co., 13 Daly, 114.

## CHAPTER XVI.

## CONTRACTS FOR PARTICULAR WORKS.

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- 697, 698. Compensation for loss the measure of damages.
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## SECTION 1.

## EMPLOYER AGAINST CONTRACTOR.

§ 696. Nature of the contract. Contracts of this sort [479] do not contemplate service by particular persons as the chief object, but the accomplishment of certain results, by work, or work and material, as the making of a carriage or the erection of a building. The labor and materials are but means or instrumentalities of the contractor, and are at his discretion, except as they are prescribed, as they often are, to

more certainly insure the required product. Such contracts are fulfilled by any service or means, in the absence of stipulations on that subject, if the end contracted for is attained.

**§ 697. Compensation for loss the measure of damages.** The rules for the assessment of damages, being based on the principle of compensation, are closely analogous to those which apply to executory contracts for the sale of personal property. If there is a total breach by the contractor only nominal damages can be recovered where the thing to be done or produced would be of no value to the employer, or if damage is merely possible or conjectural.<sup>1</sup> Thus, the plaintiff leased to the defendant certain premises, naming no term, and reserving no rent, the lessee covenanting to sink an oil well on them of a prescribed depth, by a certain day, and to pay a fixed price per cord for the wood standing on the lot; a right of re-entry was reserved on breach of the covenant. The defendant failing to sink the well, the court, on consideration of the improbability of injury to the lessor, held that only nominal damages could be recovered.<sup>2</sup> It was said: "The measure of damages is to be sought in the contract made by the parties; and where the amount of compensation is not fixed by the contract,<sup>3</sup> the natural approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages. Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff if the contract is broken. So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages if the defendant omitted to perform the contract. In these and like cases it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant. But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although

<sup>1</sup> *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360; *Petrie v. Lane*, 67 Mich. 454. Particular works have been upheld in several recent cases. *De Graff v.*

<sup>2</sup> *Chamberlain v. Parker*, 45 N. Y. 569. *Wickham*, 52 N. W. Rep. 503 (Iowa); *Lincoln v. Little Rock Granite Co.*, 19 S. W. Rep. 1056 (Ark.). See

<sup>3</sup> Contracts stipulating the damages from delay in completing particular works have been upheld in several recent cases. *De Graff v. Wickham*, 52 N. W. Rep. 503 (Iowa); *Lincoln v. Little Rock Granite Co.*, 19 S. W. Rep. 1056 (Ark.). See vol. 1, § 290.

it could be seen that the performance would have not benefited but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for the breach of the contract to show that the act to be done, or the erection to be made, would injure the land or impair its value. The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value. A man may do what he will with his own, having due regard to the rights of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it to say that his own performance would not be beneficial to the plaintiff. . . . The contract on his (the defendant's) part to dig the well, . . . if performed, could result in no benefit to the lessor, except in the possible contingency that after the well was dug the default of the defendant in paying for the standing timber on the premises, according [481] to his undertaking in the lease, might enable them to re-enter on the premises. The whole production of the well, if oil should be found, would belong to the defendant for all time, unless the possible ground of forfeiture should occur, just suggested. If this contingency happened it might be delayed until the supply of oil in the well was exhausted and the possession of the well had become of no value. The loss or gain in sinking a well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity from the prosecution of the work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damage, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery. The defendant was not paid for digging a well for the plaintiff on his premises. The well, when dug, would be upon the land of the defendant, and its product would be his. It is idle to say, and the law does not require it to be said, in face of the obvious facts, that the lessors have been damaged to the extent of the cost of digging the well by the defendant's default. . . . It is



not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of covenant by lessor against lessee for non-repair of the demised premises under an unexpired lease the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case [the amount it would cost to bore such a well] was erroneous."<sup>1</sup>

§ 698. **Same subject.** The rule which is applied when there is a breach of a contract to deliver personal property governs the damages recoverable on the failure to publish an advertisement in a prescribed manner, if its publication in substantially that way can be obtained. If that is not shown to be impracticable it will be presumed that it can be done, and the price paid will be the measure of damages.<sup>2</sup> A general statement of the rule which applies as between a contractee and contractor, on a breach by the latter, is that the former is entitled to such damages as will be equivalent to the benefit which he would derive from having a full performance of the contract. Where a defendant had agreed to build a house for the plaintiff, for which he covenanted to convey to the defendant a house and lot, for a neglect to build, the measure [482] of damages is the difference in value between the house and lot to be conveyed and the house to be built.<sup>3</sup> A plaintiff

<sup>1</sup> Doe v. Rowland, 9 C. & P. 734; Smith v. Peat, 9 Exch. 161; Turner v. Lamb, 14 M. & W. 412; Payne v. Haine, 16 id. 541.

<sup>2</sup> Tribune Co. v. Bradshaw, 20 Ill. App. 17.

<sup>3</sup> Laraway v. Perkins, 10 N. Y. 371; Mayor, etc. v. Second Avenue R. Co., 102 id. 572; Morrell v. Long Island R. Co., 15 Daly, 127; Cincinnati & S. Ry. Co. v. Carthage, 36 Ohio St. 631; Taylor v. North Pacific C. R. Co., 56 Cal. 317; Louisville, etc. Ry. Co. v. Sumner, 106 Ind. 55.

A provision in an insurance policy which gives the insurer the right to

rebuild, if it is availed of, converts the policy into a building contract. If the insurer does not wholly complete the building he is liable for such sum as will finish it. Morrell v. Irving F. Ins. Co., 33 N. Y. 429.

In Kidd v. McCormick, 83 N. Y. 391, the plaintiff covenanted to convey lots to the defendant, who was to give a bond and mortgage on each lot to secure the purchase-money; he also agreed to erect a house upon each, plaintiff to make advances as work on the houses progressed, and to be repaid out of the mortgage. Subsequently, and after building was

agreed to let the defendants have all the pine timber on his land that was suitable for good lumber; they agreed to saw the same into lumber and sell it as soon as they could; to saw no other lumber until it was done, and to pay the plaintiff an-

begun, the vendee negotiated a loan of G., which was secured by a mortgage upon a portion of the lots. All the parties agreed that a certain part of the moneys loaned should be deposited as collateral security for the completion of the houses, and that the last mentioned mortgage should have priority over that given to the plaintiff. The dwellings were not completed, and after the time fixed for erecting them the vendee abandoned the premises, and plaintiff went on and completed the buildings. The question as to the measure of damages arose in an action to reach the trust funds. After stating the general rule as it is given in the text, Folger, C. J., said: "I am aware that there has not been harmony in the expressions of learned judges in passing upon the question of the measure of damages. I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at, rather than in the rule that was to govern. Stated in its broadest form, the plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed. With more particularity, he has a right to a house as good as that which the defendants agreed to furnish; and his damage is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known is that of experts, saying what would have been the value of the one, and what is the value of the other. An-

other kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, what it did in fact cost to finish it. But these ways all lead to the same end: what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony, first, that the plaintiff is not under obligation to go on and finish the house; second, that he cannot always finish it, as he could not in the case at hand, at the day called for by the contract, when there will come into the damages the element of loss from delays; and third, that the cost of actual building may have increased after the day of performance, and so be a detrimental gauge of damage for the defaulting contractor. . . . The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, rentable, and so productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums. He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of completed houses by a purchase in the market. The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding

nually in money one-fifth of the gross proceeds of the lumber sold and collected by them. For breach of this contract by failing and refusing to saw all the timber on the plaintiff's land, it was held but one action would lie, in which, although the time of performance may not have elapsed, he would be entitled to recover damages for the continued and prospective failure of performance, to be assessed on the basis of the value at the time of the breach. And the measure of his recovery would be the profits which would have accrued to him from the performance of the contract, to be ascertained by deducting the value of the timber left unsawed from one-fifth of the value of the lumber which it would have made.<sup>1</sup> On a contractor's failure to perform the contractee may recover at least the difference between the contract price and the compensation he is obliged to pay under a new contract for the same work.<sup>2</sup>

**§ 699. Defects in work must be remedied.** The measure of damages for breach of contract for putting up particular work, as, for instance, a steam boiler, by doing it unskilfully or with defective material, is the difference between its value in its defective condition and what its value would be if completed in compliance with the contract. This latter sum may be more or less than the contract price, but it is obviously the proper standard by which to measure the damages of the employer, because a boiler so completed is exactly what he is entitled to;<sup>3</sup> then the contractor obtains also just what his

no rent. It is plain to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to G., and lose interest on his own mortgages, and pay taxes and premiums. To put him in as good predicament as he would have been had the buildings been done on the 1st of September, 1877, he should have the difference in value between the buildings thrown on his hands unfinished, and the houses as they would have been if completed according to the contract."

<sup>1</sup> *Fail v. McRee*, 36 Ala. 61; *Whalon v. Aldrich*, 8 Minn. 346; *McGovern v. Lewis*, 56 Pa. St. 231; *Houser v. Pearce*, 13 Kan. 104; *Robinson v. Bullock*, 66 Ala. 548; *Leonard v. Beaudry*, 68 Mich. 312.

<sup>2</sup> *Goldsboro v. Moffett*, 49 Fed. Rep. 213.

<sup>3</sup> *White v. Brockway*, 40 Mich. 209; *White v. McLaren*, 151 Mass. 553; *Mack v. Sloteman*, 21 Fed. Rep. 109; *Leathers v. Sweeney*, 41 La. Ann. 287; *Norway Plains Savings Bank v. Moors*, 134 Mass. 129. In the last case the defendant borrowed money on houses in process of erection, and

defective work is worth. Substantially the same measure is allowed when the rule is stated, as it sometimes is, that the contractor is liable to damages for the reasonable cost and expense, after his default, of procuring to be done any [483] specific work which he undertook to do and has not done; or to cure defects in his work when that is a prudent and practicable method of removing objections.<sup>1</sup>

If in an action on a bond to save the plaintiff harmless from liens on a certain building, and to build it by a specified day, there is a breach in both particulars, the expenditures incurred by the plaintiff in completing the house, and in discharging liens made necessary by the defendant's default, constitute the measure of damages.<sup>2</sup> And where a bond had been given, conditioned to do certain work in clearing land, for breach of it the cost of performing the stipulated work was recoverable.<sup>3</sup> On the failure to cut and remove within two years growing timber on land and to pay a stipulated price for it, the damages are the difference in the value of the timber not removed at the contract price and its market value where it is. If, however, it was within the contemplation of the parties that the timber was to be removed for the purpose of fitting the land for cultivation, there may be a recovery of the damage sustained from that cause, but only

covenanted that they should cost not less than a stated sum and should be finished in a good and workmanlike manner. There having been a breach of the contract, it was ruled in an action by the mortgagee that the measure of damages was the difference between the value of the houses as they were to be and their value as they were left, not exceeding the amount due on the mortgage. The time for determining the damage was when the houses were left as finished, or as soon afterwards as plaintiff had notice, or might have had it, of their condition. See *Lamoreaux v. Rolfe*, 36 N. H. 33; *Colton v. Good*, 11 Up. Can. Q. B. 153.

<sup>1</sup> *Weed v. Draper*, 104 Mass. 28; *Pittsburg Coal Co. v. Foster*, 59 Pa.

St. 365; *Brown v. Foster*, 57 id. 165; *Cutler v. Close*, 5 C. & P. 337; *Thornton v. Place*, 1 M. & Rob. 318; *Houser v. Pearce*, 13 Kan. 104; *Mayne on Dam.* 97; *Clifford v. Richardson*, 18 Vt. 620; *Dean v. White*, 5 Iowa, 266; *Goddard v. Barnard*, 16 Gray, 205; *Sunman v. Clark*, 120 Ind. 142; *Lord v. Comstock*, 52 N. Y. Super. Ct. 548; *O'Brien v. Anniston Pipe Works*, 93 Ala. 582.

In *Walker v. Ellis*, 1 Sneed (Tenn.), 515, it was held that expenses incurred in attempting to get elsewhere the articles that the defendant had contracted to make were not recoverable as damages.

<sup>2</sup> *Hirt v. Hahn*, 61 Mo. 496.

<sup>3</sup> *Sullivan v. Reardon*, 5 Ark. 140; *Seavey v. Shurick*, 110 Ind. 494.



for such a reasonable time, after the expiration of the two years, as will enable the plaintiff to complete the work left unfinished by the defendant.<sup>1</sup>

The plaintiff, an engineer, was employed by one S. to repair a steam threshing-machine, the work to be finished before harvest, or by the end of July or the beginning of August. It being found necessary to get a new fire-box made, the plaintiff, in June, contracted with the defendants to make one for him for 12*l.*, which was paid, and they agreed to make it in about a fortnight. The fire-box was not sent to the plaintiff until the 3d of September, when it was found to be useless. He was then obliged to employ another person to make another fire-box, for which he had to pay 20*l.* The threshing engine, in consequence of these delays, not being ready until November, S. brought an action against the plaintiff to recover damages in respect of his breach of contract, claiming 50*l.*, but he ultimately settled the matter by accepting 20*l.* and costs, making together 25*l.* 17*s.* It did not appear that the plaintiff, when he gave the defendants the order for the fire-box, communicated to them the nature of his contract with [484] S., or that they were made aware of it until after there had been a complete breach of their contract. It was held that the plaintiff was entitled to recover the sum he had paid the defendants for the fire-box, and the further sum of 8*l.*, which he had to pay in procuring another one; but that the compensation paid to S. was not such a damage as might fairly and reasonably be considered either as arising naturally from the defendants' breach of contract, or as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of [485] the breach of it.<sup>2</sup> In such cases the employer is gen-

<sup>1</sup> *Furstenbury v. Fawsett*, 61 Md. 184.

<sup>2</sup> *Portman v. Middleton*, 4 C. B. (N. S.) 322; *Hadley v. Baxendale*, 9 Exch. 341. See *Smeed v. Foord*, 1 E. & E. 602; *Collins v. Baumgardner*, 52 Pa. St. 461; *Hawley v. Belden*, 1 Conn. 93; *Fisher v. Goebel*, 40 Mo. 475.

*Missouri, etc. Ry. Co. v. Fort Scott*,

15 Kan. 435, is an interesting case on the subject of damages. The city of Fort Scott subscribed for \$75,000 of stock in the Missouri, Kansas & Texas Railway Co., and issued \$75,000 of its bonds in payment therefor. In pursuance of the same contract the city also issued \$25,000 of its bonds to the company for the purchase of right of way through the city, and

erally entitled to measure his damages by what the necessary expense would be to procure to be done the work which the contractor neglected to do, whether it is done or not; for the same reason that a vendee in an executory contract for the sale

for grounds for machine shops, engine houses, etc. In consideration thereof, the company promised that, within six months, it would construct a railroad from Sedalia, Mo., through Fort Scott, to connect with the line running from Junction City in a southeasterly direction; that it would make this a great through line to the Indian Territory and Texas, and construct no other line of road south of Fort Scott in the same direction; that it would make Fort Scott the end of a division, and erect engine houses and machine shops at or near that place, before doing so at any other point southwest of Sedalia, on the through line of its road. The company completed this contract, except that it did not make Fort Scott the end of a division, and did not erect an engine house and machine shops there, but erected them at Parsons. In an action by the city for the breach of this contract, testimony was admitted, against objection on behalf of the company, of a diminution of population for the purpose of showing a decline in the price of real estate in the city during a period subsequent to the construction of the road, and prior to the building of the shops and engine house at Parsons, and ending after the fact of such building became known at Fort Scott. This testimony was held, on appeal, inadmissible, because speculative; it only tended to show a loss of uncertain profits expected to accrue from the performance of the contract; and also because such depreciation and depopulation might have resulted from other causes as well as from

the breach of the contract. The court suggested that recovery might be measured by the consideration, as though the company's undertaking were a condition precedent or subsequent; and, in the latter case, the city is entitled to recover the amount paid with interest; or, where the unperformed condition is the erection of buildings or other improvements within the city, the value thereof for the purposes of taxation might be treated as the measure of damages. Brewer, J., said: "The city, by the non-performance of the condition, loses the value of the improvement for the purpose of taxation, and this is a direct pecuniary loss, and one susceptible of determination with reasonable certainty. The average rates of taxation in the past—there being no exceptional causes of temporary taxation—may fairly be accepted as the rates of the future. The value of the improvement being shown, the amount of the annual tax is a simple mathematical calculation. This annual tax may be considered in the nature of an annuity whose present value is susceptible of exact determination by the ordinary tables."

But where there is a breach of a contract to locate a depot on the land of an individual the damages are measured by the difference in the value of the land without the depot and its value if the location had been made. *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 436; *Louisville, etc. Ry. Co. v. Sumner*, 106 Ind. 55; *Watterson v. Allegheny Valley R. Co.*, 74 Pa. St. 208; *Houston, etc. Ry. Co. v. Molloy*, 64 Tex. 607.

of goods need not, in fact, purchase the goods he was entitled to receive from the vendor in order to have his damages computed on the basis of what they would cost him at the time of the breach.

§ 700. **Liability exists though accident prevents performance.** Where the undertaking is to make some article, or even to build or complete a house on the employer's land, the contractor is not exempt from liability as for a breach of his contract, though he has been prevented from performing it solely by some accident or casualty, by which the result of his work before completion has been destroyed without any fault on his part; as where the building he has contracted to erect has fallen in consequence of some latent defect in the soil impairing the foundation;<sup>1</sup> or by lightning or fire.<sup>2</sup> But it is otherwise where a person agrees to expend labor upon a specified subject, the property of another, as to shoe his horse or slate or perform other work upon his dwelling-house, and the horse dies, or the house is destroyed by fire;<sup>3</sup> or where a

<sup>1</sup> *Dermott v. Jones*, 2 Wall. 1; *School Trustees v. Bennett*, 27 N. J. L. 513.

<sup>2</sup> *Tompkins v. Dudley*, 25 N. Y. 272; *Adams v. Nichols*, 19 Pick. 275; *School District v. Dauchy*, 25 Conn. 530; *Bacon v. Cobb*, 45 Ill. 47; *Shanks v. Griffin*, 14 B. Mon. 153. See *Clark v. Franklin*, 7 Leigh, 1.

<sup>3</sup> *Lord v. Wheeler*, 1 Gray, 282; *Cleary v. Sohler*, 120 Mass. 210; *Wells v. Calnan*, 107 id. 514; *Niblo v. Binsse*, 1 Keyes, 476; *Schwartz v. Saunders*, 46 Ill. 18; *Sinnott v. Mullin*, 82 Pa. St. 333; *Bianchi v. Maggini*, 17 Nev. 322; *Rawson v. Clark*, 70 Ill. 656; *Cook v. McCabe*, 53 Wis. 250. *Contra*, *Brumby v. Smith*, 3 Ala. 123. See *Wilson v. Knott*, 3 Humph. 273.

In *Hollis v. Chapman*, 36 Tex. 1, the plaintiff, a carpenter, undertook to furnish material and do the wood work necessary to finish defendant's brick building, and to turn over the building, complete, by a given day for a specified gross sum. When the

plaintiff had nearly completed the work the building was destroyed by fire without his fault. *Ogden, J.*: "Under our blended system of legal jurisprudence, and especially under our peculiar system of pleading, common counts in declarations, as technically known at common law, have never been considered as necessary or essential. But while most of the fictions and many of the forms recognized and prescribed in the books have in this state been abolished, yet the substance of every count and form is as requisite under our practice as under any other system; every action being a special action on the particular case, the petition should set forth a full and clear statement of the cause of action 'without ambiguity or contradiction, and also a clear statement of the relief sought.' The case was therefore stated so as to exhibit the particulars, and might appear to be an action on the real transaction." The opinion continues

building is agreed to be erected on the employer's lands, [487] and is destroyed by any cause against which he was bound to

after disposing of some preliminary questions: "It may be admitted that by the civil and common law, where there is a specific and positive contract absolutely to do an entire piece of work, or job, subject to no conditions either express or implied, and to be paid for only when the work is completed according to the contract, such contract is not apportionable, and the contractor is not entitled to any pay until the work is completed. But where there is a condition, or when the contract is dependent upon the execution of another contract, or where the payment is not specially deferred to the completion of the undertaking, in such a case the contract is apportionable; and in case of an accident rendering the completion of the contract impossible, the contractor is entitled to *pro rata* pay for his work; and this appears to have been the rule recognized by the best authorities. Story on Bailments, 363. In the case at bar the appellant Hollis agreed to furnish the material and do the carpenter work on two brick buildings then in process of erection for a specified sum. He further agreed to turn the buildings over finished complete, and to do the work with all possible dispatch. This agreement could not possibly have been an entire, independent contract, for it was dependent on many circumstances, such as the erection of the walls to receive the carpenters' work, etc., etc. And we think the weight of authority authorizes us in deciding that on the event of the accidental destruction of the building by fire, he was entitled to recover the value of his labor and materials expended on the building. Clark v. Franklin, 7 Leigh, 1; Hay-

ward v. Leonard, 7 Pick. 181; Story's Eq. 362."

The court puts the recovery on the "*apportionability*" of the contract, and the authority of Texas cases to that quality of such contracts. Baird v. Ratcliff, 10 Tex. 81; Hillyard v. Crabtree, 11 id. 284; Gonzales College v. McHugh, 21 id. 256; and Carroll v. Welch, 26 id. 147. But neither of the cases cited bears any analogy to the case decided. They do not decide any question as to the contract being apportionable; they were contracts not apportionable, and the workmen recovered on the *quantum meruit*, based on the benefit received by the other party from the part performance. In the case of Hollis v. Chapman the right to recover may be maintained, but certainly not on the ground that the contract was apportionable, but because the risk of such destruction was properly on the other party, and the complete performance of the contract was prevented by the destruction of the building. The provision for payment on completion should be deemed to be on the implied condition that the building be not destroyed. Where there is no express stipulation as to the time of payment the contract is apportionable, and it may be demanded as the work progresses, as stated in the quotation contained in the opinion from Appleby v. Myers, L. R. 2 C. P. 651: "It is quite true that materials worked by one into the property of another become part of the property, and therefore, generally, in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the



provide.<sup>1</sup> The measure of damages in such a case is, *prima facie*, the *pro rata* share of the contract price.<sup>2</sup>

whole work is not completed. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as in the case of *Roberts v. Havelock*, 3 B. & Ad. 404, or because in consequence of a fire he could not go on with it, as in *Menestone v. Athawes*, 3 Burr. 1592."

In *Cook v. McCabe*, 53 Wis. 250, the authorities are considered by Cassoday, J., and these conclusions reached: "1. Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible. 2. But this rule is only applicable when the contract is positive and absolute and not subject to any condition, either express or implied. 3. Where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

4. Where, as here, one having nothing to do with the painting, glazing, carpenter or joiner work contracts to furnish materials for the mason work of a building and perform the labor thereon, except that the owner, for whom the same is to be constructed, is to furnish upon the ground all the sand, stone, and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before completion is destroyed by fire without the fault of the contractor, the loss must fall upon the owner, especially where he has the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed."

<sup>1</sup>In *Sinnott v. Mullin*, 82 Pa. St. 333, the plaintiff contracted to build four houses for defendant, and failed to complete them by reason of the falling of a stone wall on another part of the defendant's lot, whereby the buildings which were nearly finished were destroyed. In an action to recover for work done and materials furnished, it was contended for the plaintiff that it was the duty of the defendant to provide a place for the erection of the houses under the contract that was reasonably secure and safe, and that the contract itself implied an undertaking on his part that the place chosen was free from danger. The court say, by Woodward, J., that this point should have been affirmed "subject to the qualification that the plaintiff was barred of all right to a verdict, if he had taken upon himself the risk of danger from the

<sup>2</sup> *Cook v. McCabe*, 53 Wis. 250.

**§ 701. Contractor not answerable for defects in plans.**

Where the builder constructs the building in a work- [488] manlike manner, according to the plans referred to in the contract, or, in case of any material deviation, where it is made with the consent of the other party, such builder will be under no responsibility for its subsequent destruction.

condition of the defendant's property. The wall was on the ground on which the houses were to be built, but on a part of it over which he had no rights. The case stands as if the injury had resulted from the fall of a structure on adjoining property belonging to the defendant. The relations of the parties were created by the contract, and for the purposes of this question they do not essentially differ from the relations towards each other which exist between master and servant in the ordinary contract for the employment of labor. The plaintiff had the right to require that the place where his work was to be done should, in the language of the point, 'be reasonably safe and secure,' and such a place it was the duty of the defendant to afford. Against manifest and patent danger the plaintiff would be held to take his chance. It was for the jury to say whether the danger was manifest and patent here. Was this wall reasonably safe and secure? If not, were the defects in its construction latent? And were they such defects as the defendant was bound to know? Without entering on the perilous regions of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of the employer to advise the employee of all defects which the employee ought to know; and that the employer, if he fail in performing his duty, is liable to the employee for injury the latter may thereby receive. Wharton on Neg-

ligence, § 209. Further than this, the employer is not only liable for injury sustained from extraneous latent dangers, if he withhold from the employee notice of them (*Baxter v. Roberts*, 44 Cal. 187), but he is liable also for injury caused by defects of which the employer may not have been cognizant, but which it was his duty to have searched for and remedied. Whart. on Neg., § 211. Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger can occur. The risks necessarily involved in the service must not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had the right to expect it would be kept. Cockburn, C. J., in *Clark v. Holmes*, 7 H. & N. 937. There was evidence that the attention of the plaintiff was called to the condition of the wall while negotiations for the contract were going on. But whether he satisfied himself as to its safety, and assumed the risk which his work in its neighborhood might involve, or relied on the assurance of the defendant, and concluded his contract in ignorance of latent dangers, it was the province of the jury to decide."

whether caused by its own inherent weakness or from the violence of storms. When his undertaking is simply to do the work with reasonable skill after the designs furnished by the architects, he is not a guarantor of the strength of the edifice when finished, or its capacity to withstand the violence of the winds.<sup>1</sup>

**§ 702. Works contracted for a particular purpose.** If a contract is made for the manufacture of a specific article, or for specific work for a particular use or purpose, mutually contemplated by the parties, damages for a breach will be assessed with such scope as to afford compensation for any [489] injury which may naturally and proximately result in respect to that object, whether that injury be in gains prevented or losses sustained. Where the grantee of a right of way through the grantor's land covenanted to maintain a gate placed at the terminus, and failed to replace it after it had been destroyed, the cost of rebuilding the gate was held not to measure the damages, but the actual injury sustained by the covenantee upon his land; it was a continuing covenant, and intended for the protection of the farm.<sup>2</sup> If machinery made to order proves insufficient for the purpose for which it was ordered, and varies from that contracted for, whereby the purchaser is prevented from manufacturing to the extent he would otherwise have done, he may recover the contract price of articles sold which he is prevented from manufacturing, less the expense he would have incurred if they had been manufactured, over and above the sum necessarily expended in manufacturing to the extent he has done.<sup>3</sup> If in consequence of the insufficiency of an article which has been man-

<sup>1</sup> Clark v. Pope, 70 Ill. 128; Wright v. Sanderson, 20 Mo. App. 534.

<sup>2</sup> Beach v. Crain, 2 N. Y. 86; Buck v. Rodgers, 39 Ind. 222; Hyde v. Mechanical Refrigerating Co., 144 Mass. 432; Beeman v. Banta, 118 N. Y. 538.

On the failure to furnish a city with a full and ample supply of water for fire service the damages are measured by the difference between the supply furnished and that contracted for. Damages sustained

by individuals cannot be considered. Wiley v. Athol, 150 Mass. 426.

On the breach of a contract by a railway company to fence its right of way there may be a recovery for animals killed, damage done by trespassing animals, and for the loss of pasturage. Louisville, etc. Ry. Co. v. Sumner, 106 Ind. 55.

<sup>3</sup> Winans v. Sierra Lumber Co., 66 Cal. 61.

ufactured with knowledge of the place in and the use to which it is to be put damage is done to other property of the purchaser, the manufacturer is liable therefor. If interest is awarded on the amount which will restore the property to its former condition, there cannot be a recovery for lost profits.<sup>1</sup> In a recent case it was understood between the parties to a contract for the manufacture of machinery that the order was given for the purpose of enabling the plaintiffs to organize, in accordance with an agreement they had entered into, a limited partnership of which they were to be the sole members. The machinery was not furnished as agreed and could not be obtained elsewhere, and the plaintiffs were disabled from turning over to the new company the property which they should have received for that purpose, and prevented from establishing such company and starting it under such favorable auspices and with such an equipment for the transaction of a profitable business as they could have done if the defendant had performed his contract. The court did not intimate that there might be a recovery of damages by the plaintiffs as members of the limited partnership, but held that the damages which plaintiffs suffered by reason of defendant's fault in preventing them from successfully establishing and fitting out a business to be conducted by them as such partnership might be recovered; in other words, the value of the articles contracted for were to be estimated with reference to their intended use in the business for which they were to be furnished.<sup>2</sup> The plaintiff sued on a note given for work done and materials furnished in the construction of a sheet and galvanized iron roof upon a livery-stable belonging to defendant. The latter pleaded that the roof was constructed in a negligent, unskilful and unworkmanlike manner, and of inferior materials, in consequence whereof it leaked, and defendant's hay was wet and his wall damaged, and he was put to inconvenience in the necessary removal of his stock from one portion of his stable to another; for which he claimed damages. The court held these damages were not too remote; that the defendant was entitled to recover to their extent if he had no knowledge of such defects; but if he knew of them in time

<sup>1</sup> *Erie City Iron Works v. Barber*,  
102 Pa. St. 156.

<sup>2</sup> *Abbott v. Hapgood*, 150 Mass. 248.



to protect himself at a trifling expense, or by reasonable exertions, he could recover nothing for damages suffered in consequence of such leakage.<sup>1</sup> If the time for the completion of the work is extended by consent the contractor's liability for the consequences of defects in it continues during the extension and until the expiration of a reasonable time for remedying them.<sup>2</sup> In Michigan the recovery of lost profits on contracts of the nature herein considered is very much restricted. The cases establishing this limited liability are stated in detail and discussed elsewhere.<sup>3</sup>

**§ 703. Damages for delay.** For delay in the performance of particular work damages will be recoverable according to the injury. Where it was paid for in advance, and no special damage was shown, interest on the amount paid was allowed as damages.<sup>4</sup> For delay in constructing and putting up machinery in a flouring mill the employer was held entitled to recover such sum as the mill would have earned during the time of such delay, taking its fair ordinary earnings after deducting the expense of running it; but it should appear that the party claiming such damages was in a condition to work his mill by having grain to grind.<sup>5</sup> There can be no recovery for the loss of the use of a mill which has not been erected, though the person who was to manufacture a portion of the machinery therefor was apprised of the purpose of his customer to erect it.<sup>6</sup>

[490] Where a person undertakes to erect a building, or to put a mill or machinery in operation, he ought to be holden to indemnify the other party against the loss of the use of either after the expiration of the time for performing the contract; and if it is defectively done, he should indemnify him for

<sup>1</sup> Haysler v. Owen, 61 Mo. 270; vol. 1, § 88; Gibson v. Carlin, 13 Lea, 440.

<sup>2</sup> Gibson v. Carlin, 13 Lea, 440.

<sup>3</sup> Vol. 1, § 63, note; McKinnon v. McEwan, 48 Mich. 106; Allis v. McLean, id. 428.

<sup>4</sup> Edwards v. Sanborn, 6 Mich. 348.

<sup>5</sup> Davis v. Talcott, 14 Barb. 611, reversed on another point, 12 N. Y. 184. But see Griffin v. Colver, 16 N. Y. 489.

On the failure to complete the printing of a book within the time agreed there cannot be a recovery for profits lost on mere proof that there may have been a demand for the book. But if sales had been made and orders withdrawn in consequence of the delay, proof thereof would have been admissible. Hill v. Parsons, 110 Ill. 107.

<sup>6</sup> Bridges v. Lanham, 14 Neb. 369.

such loss of the use during the time necessarily spent in repairing and putting it in order.<sup>1</sup> In such cases the rental value during the delay is the general rule.<sup>2</sup> The loss of [491] the use is the direct and inevitable result of the breach. The

<sup>1</sup> Griffin v. Colver, 16 N. Y. 489.

<sup>2</sup> McConey v. Wallace, 22 Mo. App. 377; Brownell v. Chapman, 51 N. W. Rep. 251 (Iowa); Ruff v. Rinaldo, 55 N. Y. 664; Freeman v. Clute, 3 Barb. 424; Wagner v. Corkhill, 40 Barb. 175; Cassidy v. Le Fevre, 45 N. Y. 562; Willey v. Fredericks, 10 Gray, 357; Brown v. Foster, 51 Pa. St. 165; Hexter v. Knox, 63 N. Y. 561; Winne v. Kelley, 34 Iowa 339; Clifford v. Richardson, 18 Vt. 620; Rogers v. Bemus, 69 Pa. St. 432; Fisher v. Goebel, 40 Mo. 475; St. Louis, etc. R. Co. v. Lorton, 72 Ill. 118; Sperry v. Fanning, 80 id. 371; Boyle v. Reeder, 1 Ired. 607; Korf v. Lull, 70 Ill. 420. See Fort v. Orndoff, 7 Heisk. 107; Fletcher v. Tayleur, 17 C. B. 21; Allis v. McLean, 48 Mich. 428; Taylor v. Maguire, 12 Mo. 313.

In *Friedland v. McNeil*, 33 Mich. 40, it was held that delay in the completion of a contract to do only the mason work of a church will not authorize the recovery of the loss of pew rents as damages; such loss cannot be said to be the necessary, natural or probable result of such delay, since the completion of the contract does not put the building in condition for the renting of pews. Cooley, J., said: "A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the building might never be put in condition for renting of pews, and yet he be in no way responsible. It can never be said that the loss of rents is a necessary, natural or probable result of a particular default, when, had no default occurred, the neces-

sary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages resulting from loss of rents must assume that the trustees had the ability and inclination to proceed at once to complete the church, and were only delayed by the contractor's default."

See *Wagner v. Corkhill*, 40 Barb. 175, which was an action to recover for work done under a building contract; the defense was that the building was to be completed by a specified time, and was not completed within that time; it was held that, if it appears that the defendant had the building erected for his own use, and it was completed afterwards with his knowledge and without objection from him; that he was kept out of the use by the plaintiff's failure to perform on his part, the law will presume that he was damnified, and will give him, by way of compensation, what such use was worth for the time he was deprived of it; so, if he was, by such failure, prevented from renting it. But if it was proved that he did not contemplate using the building himself, or in his own business, but that he caused it to be built for the purpose of renting to others; and that he did not in fact lose an opportunity of renting it, by reason of the plaintiff's delay, he cannot recoup against his claim the rents and profits from the time when it should have been to the time when it was completed.

*Blanchard v. Ely*, 21 Wend. 342, is an authority opposed to the allowance of profits consisting of the earnings of a steamboat. A boat

value of that use the injured party is entitled to recover; and it should be assessed on the same principle as the value of personal property which a vendor fails to deliver in fulfillment of his contract of sale. Where no special use, enhancing the

was delayed in its trips in consequence of being defectively constructed. The judge at the trial directed the jury not to allow as damages for delays the profits which might have been made from the trips lost; in respect to which Cowen, J., said: "No common-law authority was cited at the bar, one way or the other, having any direct application to the measure of damages in such a case as this, nor am I aware that any exists." The direction of the judge below was approved. See *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416.

In *Griffin v. Colver*, 16 N. Y. 489, Selden, J., said: "It is clear that whenever profits are rejected as an item of damages it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for the estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of *Blanchard v. Ely* must have proceeded upon this ground, and can, I apprehend, be supported upon no other. . . . In . . . (that case) . . . the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct, and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. . . . Had the defendants in the case of *Blanchard v. Ely* taken the ground that they were entitled to

recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiff's contract. The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but, in a majority of cases, would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that in estimating what would be the fair estimate of the rent of a mill we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly, if not quite, as certain as the market value of commodities at a particular time

value to the employer or vendee, was mutually con- [492] templated when the contract was made, only the market or general value is recoverable. The enhanced value is not rejected merely because it is uncertain; it may be quite certain, as where an existing contract for renting or resale provides for it; still it is rejected because it is not a gain mutually contemplated to accrue from performance of the contract, nor the loss of it as an injury mutually contemplated to result from its breach. In the absence of such notice the defaulting party is only liable for the general rental value — that which would be received in the multitude of instances.<sup>1</sup> The damages recoverable must be such as may fairly be supposed to have entered into the contemplation of the parties when they contracted; that is, they must be such as might naturally be expected to follow its violation, be certain in their nature and in respect to the cause from which they proceed.<sup>2</sup> If expenses have been reasonably incurred in anticipation of the performance of the contract they may be recovered.<sup>3</sup>

This rule of rental value for delay, however, has been departed from where the delay would be indefinitely continuous, as where the execution of the contract has been abandoned; then the damages are measured by the difference between the value of the property as it would be if the contract had been performed and as it is in consequence of the failure to fulfill it. Where a railroad company was bound to build and perpetually maintain a side-track in front of certain lots owned by the covenantee, on a breach of this covenant by abandonment after the track had been laid, it was held that the proper measure of damages was the difference in value of the [493] plaintiff's lots with the side-track operated and not operated, together with interest thereon from the abandonment up to

and place." See *Western Gravel Road v. Cox*, 39 Ind. 260. Compare *Sikes v. Paine*, 10 Ired. 280, and *Beverly v. Williams*, 4 Dev. & Batt. 236.

<sup>1</sup> *Hadley v. Baxendale*, 9 Exch. 341; *Liljengren Furniture & L. Co. v. Mead*, 42 Minn. 420. Compare *Waters v. Towers*, 8 Exch. 401; *Fox v. Harding*, 7 Cush. 501.

<sup>2</sup> *Griffin v. Colver*, 16 N. Y. 489.

If machines are ordered to be made for sale in a foreign market, and the manufacturer has knowledge of that fact when he contracts to supply them, he is liable, on a breach of his obligation, for their value there. *Alabama Iron Works v. Hurley*, 86 Ala. 217.

<sup>3</sup> *Brownell v. Chapman*, 51 N. W. Rep. 249 (Iowa).



the date of trial, or not, at the discretion of the jury. This rule, say the court, "renders the ascertainment of the damages easy, certain and final; and limits them to what would surely be within the contemplation of the parties. Whereas, the annual rental value is more speculative and uncertain; is liable to great fluctuation from causes not within the scope of the contemplation of the parties, nor indeed within the range of their anticipations; besides, if the damages are apportionable, the measure of difference in annual rent would result in a multiplicity of suits; or, if not apportionable, then the result must be purely speculative (as to future rents), or the plaintiff be barred by one recovery from any other."<sup>1</sup>

§ 704. **Same subject.** The damages allowable for delay or entire neglect to perform may include any actual loss which happens naturally and in the ordinary course of things, where the circumstances from which they so result may be supposed to have been mutually contemplated by the parties when they made the contract. Where there is delay in the erection of machinery, or neglect to repair it when found defective, or it remains idle in consequence of failure to do some other work necessary to its operation, there may be a loss from the idleness of dependent machinery and of laborers;<sup>2</sup> and in case of the manufacture of part of a machine the expenditure incurred in making the other parts and the loss of profits.<sup>3</sup> So, also, such a breach of contract for particular work may result in the destruction of other property, or be detrimental to it, as by failure in building a fence or shelter. Compensation for such losses, when they occur notwithstanding due vigilance and exertion of the injured party to prevent or reduce the injury, may be recovered.<sup>4</sup> But the contractor is not responsible where the injury is suffered, not directly from the delay or refusal to perform, but from some extraordinary or fortu-

<sup>1</sup> *Amsden v. Dubuque, etc. R. Co.*, 28 Iowa, 542.

<sup>2</sup> *Boyle v. Reeder*, 1 Ired. 607; *Sakoda Manuf. Co. v. Pennington*, 2 Spear, 735; *Colton v. Good*, 11 Up. Can. Q. B. 153; *Florence Machine Co. v. Daggett*, 135 Mass. 582. See *Johnson v. Matthews*, 5 Kan. 118; *Walker v. Ellis*, 1 Sneed, 515.

<sup>3</sup> *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71 (loss of profits resulting from neglect of statutory duty to boom logs).

<sup>4</sup> *Buck v. Rodgers*, 39 Ind. 222; *Haysler v. Owen*, 61 Mo. 270. See *Houser v. Pearce*, 13 Kan. 104.

itous cause having no relation to his breach of contract, except that it was contemporaneous.<sup>1</sup> A plaintiff had [494] made a contract with defendants to tow two boat-loads of coal by the first rise in the river; they refused to tow them when the rise came; the boats, remaining at their moorings, were struck by a raft set afloat by a sudden rise in the river and sunk without any neglect of the plaintiff. It was held that the defendants were not liable for the loss of the boats and coal. The contract was to tow the boats from Pittsburg to Oil City, and the plaintiff was unable to procure other tows. And it was also held that the jury had been correctly charged that there was a breach of contract which rendered the defendants liable for the difference in the value of coal at Pittsburg and Oil City at the time the boats would have arrived there if the contract had been performed, less the cost of getting it there; and that the same rule applied to the boats.<sup>2</sup> In *Calkins v. Baumgardner*<sup>3</sup> the court, for failure to boat coal according to contract, held that the employer was entitled to recover not only the difference in the price of freight, but also for trouble and expense incurred in procuring other boats, and if all his efforts were ineffectual, and his supply was insufficient and much less than it would have been had the contract been fulfilled by the defendant, whereby, in consequence of deficient supply and increased price of coal, he sustained loss and injury in his business, such loss would be another element of damages for which claim might be made; and that if he incurred expenses on account of his expected receipt of this coal under the contract, which he would not otherwise have encountered, these might also be added in making up the amount of damages.<sup>4</sup>

<sup>1</sup> *Ashe v. De Rossett*, 5 Jones' L. 299; *Daniels v. Ballantine*, 23 Ohio St. 532; *Michigan C. R. Co. v. Burrows*, 33 Mich. 6; *Denny v. New York C. R. Co.*, 13 Gray, 481. Compare *Parmalee v. Wilks*, 22 Barb. 539.

<sup>2</sup> *McGovern v. Lewis*, 56 Pa. St. 231.

<sup>3</sup> 52 Pa. St. 461.

<sup>4</sup> In *Smith v. Smith*, 45 Vt. 433, an

item of alleged damage from defendant's failure to complete a highway within the stipulated time was a deduction the plaintiff was obliged to make in the rent of a house on the line; held, conjectural and remote. Another item, for being necessitated by the same breach to build a winter road for his use, was allowed. See *Walrath v. Whittekind*, 26 Kan. 482.

In *Pittsburg Coal Co. v. Foster*<sup>1</sup> the plaintiff contracted to furnish the defendant, on the 1st of February, an engine to draw coal cars on a track of unusual width; the engine was not delivered until May; the defendant gave evidence that an [495] engine for such track could not be hired, and that he had to transport his coal by horses; held, that evidence of the difference of cost of transportation between horse power and by the engine during the plaintiff's delay was admissible on the question of damages. Agnew, J., said: "The true inquiry which arose under these circumstances was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively within the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendant's track by the 1st of February. The damages ordinarily recoverable are those necessarily following the breach which the party guilty of the breach must be presumed to know would be the probable consequence of his failure.<sup>2</sup> This rule is well expressed by Strong, J., in *Adams Express Co. v. Egbert*.<sup>3</sup> They must be a proximate consequence of the breach, not merely remote or possible. There is no measure of losses of the latter kind. 'But, on the other hand,' he remarks, 'the loss of profits or advantages which must have resulted from a fulfillment of the contract may be compensated in damages when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for and have been in the contemplation of the parties when it was made.'<sup>4</sup> . . . That the loss in this case was immediate and the necessary consequence of non-fulfillment is obvious. . . . The direct consequence of not getting it (the engine) was that they were obliged to continue transporting the coal as before by horses and mules until the engine was put there." But the offer to prove that the defendants could have mined and hauled one-third more coal with the engine than by the old mode, and to show the profits thence arising, was held too remote. "While it is obvious that F. must have known that the failure would compel the

<sup>1</sup> 59 Pa. St. 365.

<sup>2</sup> 2 Greenlf. Ev., § 253.

<sup>3</sup> 56 Pa. St. 364.

<sup>4</sup> *Fassler v. Love*, 48 Pa. St. 410-11; *Fleming v. Beck*, id. 312-13; *Hadley v. Baxendale*, 9 Exch. 341.

company to continue in the use of the old mode of transportation, it cannot be fairly inferred that they would know that the possession of the engine would enable the company to mine more coal and also to haul more. This is a possible or remote consequence, but not a necessary one.”<sup>1</sup> A

<sup>1</sup>In *Hazleton Coal Co. v. Buck Mountain Coal Co.*, 57 Pa. St. 301, the latter company covenanted to furnish for transportation over the other company's railroad all the coal they should mine to the amount of one million tons, guarantying that the quantity should not be less than six hundred thousand tons in eight years. The Hazleton Coal Co. covenanted to furnish transportation accordingly. The jury were charged, and it was held properly charged: “If the jury should find that the defendants failed to transport the coal offered to them under the contract, the damages would be the loss the plaintiffs suffered on the coal thus offered for transportation. This loss would be the difference between the cost of mining, preparing and transporting the coal to Penn Haven, and the price it would have brought there. This is the direct and immediate consequence of the defendants' breach of their contract. The defendants had the exclusive control of the transportation. The plaintiffs had no other route to Penn Haven to avail themselves of and to reduce the loss to the difference in cost of transportation. The plaintiffs being confined to this route, and yet denied it by the defendants' refusal to transport, the direct loss is the difference between the cost of the coal at Penn Haven and the price it would bring there, or in other words the profits. I say Penn Haven, because it is the terminus of the Hazleton road, and of the shipment under the contract. But the jury will remember . . . that the

actual shipments did not end there, the coal being carried by mining arrangements with other roads to markets further off, and there was probably no general market for the sale of coal at Penn Haven. The jury would, therefore, have a right to take the price of the coal in the market of sale, and to deduct from this the cost of transportation from Penn Haven, and the expense of putting the coal in the market, in order to find a fair price at Penn Haven, and from this deduct the cost of mining and preparing the coal and of transporting it to Penn Haven. But besides the coal actually mined and ready for transportation, if the defendants refused to furnish sufficient transportation, and thereby compelled the plaintiffs to desist from mining up to their reasonable productive capacity, this would be an injury for which damages may be allowed. If, by the defendants' breach of their contract and failure to furnish the necessary transportation, the plaintiffs became unable to mine because of the blocking up of their mines, so that the production must cease for the want of cars to take it away, the defendants cannot set up the consequences of their own breach as a defense, and resist a recovery, because the coal could not be mined and offered to them. The injury of the plaintiffs would be the loss they suffered on the reasonable amount of coal they were, in the course of mining, able, ready and willing to mine, and offer for transportation, had they not been prevented by the defendants' acts



subcontractor who is prevented from performing by the neglect of his principal to do preliminary work may recover profits on the work he might have performed, but not for the loss of profits because of inability to do other independent

from doing so. To the extent of this breach of the defendants in failing to furnish cars beyond the number they did furnish, if so found by the jury, the plaintiffs would be entitled to a fair and reasonable sum in damages—what the jury can properly find, on all the evidence, as a compensation for the reasonable amount of coal they were thus prevented from mining.” See *Laurent v. Vaughn*, 30 Vt. 90; *Haven v. Wakefield*, 39 Ill. 509; *Taylor v. Maguire*, 13 Mo. 517.

In *Prosser v. Jones*, 41 Iowa, 674, J. agreed to thresh the grain of P. whenever the latter should require it to be done, but failed to comply with the terms of the agreement. This appears to be the naked statement as to the contract; but it was alleged that when notice was given from time to time to defendants, they promised to do the work, and the plaintiff, at their request, piled up and stacked a large part of his grain without binding it; that the rest was standing in shocks in the field and defendants directed that it should be left in that condition, to be threshed out in the shock; that the plaintiff, relying on these promises and directions, did not stack all of his grain; that he could not procure help to stack it; that he attempted to procure others to thresh it, but could not, for the reason that there was no other machine in the neighborhood, and that by reason of these matters plaintiff's wheat was greatly injured, for which he demanded damages. The claim for these special or consequential damages was stricken out of the petition, because

the plaintiff sought to recover on the original contract and not on the subsequent promises; and because the latter added nothing to his rights upon the contract. Beck, J., said: “The defendants undertook to do the threshing within a time fixed after notice to them. The contract cannot be interpreted so that it may be inferred that damages of this kind were within the contemplation of the parties when it was executed. The law does not hold one liable for all the consequences that may follow the breach of his contract; if it were so his liability would be without a limit, for it would continue as far as the consequences of his act could be traced. But the law wisely limits liability to the direct and immediate effects of the breach of a contract. The losses and expenses set up in the petition are not of this character. They resulted remotely from the fact that defendants failed to thresh the grain, and are not the natural and proximate consequences of the defendants' breach of the contract. Such damages are not recoverable.”

According to the general rules on which consequential damages are allowed, the damages here sought to be recovered were not remote. They were manifestly within the contemplation of the parties. The case of *Smeed v. Foord*, 1 E. & E. 602 (see *ante*, § 666), is a case in which such losses were held recoverable for breach of contract to furnish a machine to thresh grain in the field. See *Houser v. Pearce*, 13 Kan.

work;<sup>1</sup> nor can there be a recovery for the loss of time of men employed to do the work, and also for the value of their services. This would be allowing double damages.<sup>2</sup>

§ 705. **Consequential damages for defective work.** A party was employed to dress two pairs of burr mill stones in a mill at \$16 a pair. There was no special contract as to the profits to be derived from the mill. On these facts it was [497] held that there was no error in saying to the jury that they should estimate the immediate loss and not the remote consequences of the work, with reference to any circumstances attending it; nor was there evidence of any special facts brought to the employee's notice to show that his contract was made in view of such consequences, as the loss of custom.<sup>3</sup> [498] Agnew, J., followed this ruling by these observations: "A very small part of the machinery of a mill or factory may be so essential to its running that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever supposed that the blacksmith, millwright or mechanic who undertakes to repair or replace it, and whose compensation may be a few dollars, or even a few cents, is by his implied contract to do his work in a workmanlike manner to be held liable for the large losses of the mill being idle? But few men could be found to work at a risk so great for a compensation so inadequate. But where by the terms of a special contract, or the facts brought into view at the time of his employment, the attention of the party is called to the fact that the risk is to be his, and he enters upon the duty with this consequence in his mind, he may be held to another measure of compensation."

If a person engages in the business of seaching public records, examining titles to real estate and making abstracts thereof for compensation, the law implies that he assumes to possess the requisite knowledge and skill, and undertakes to use due and ordinary care in the performance of his duty; and for failure in either of these respects, resulting in damages, the party injured is entitled to recover. Where a party was employed to examine the records and make an abstract of the title to real estate, and he omitted to note the fact of a judg-

<sup>1</sup> O'Connor v. Smith, 19 S. W. Rep.    <sup>2</sup> Id.

168 (Texas).

<sup>3</sup> Fleming v. Beck, 48 Pa. St. 309.

ment and sale of the land for taxes, of which the employer who purchased the land was ignorant until the time for redeeming had expired, and was consequently obliged to pay out money to remove the cloud upon his title, it was held he was entitled to recover of the person making the abstract the sum so paid to remove the cloud.<sup>1</sup> For the failure to deliver a chattel mortgage and cause it to be recorded, the party in default is liable for the damages resulting from the loss of the lien upon the property mortgaged. The sum realized on its sale on execution is not conclusive as to its value against a stranger to the writ.<sup>2</sup> If manufactured articles are not up to the required standard as to quality the employer cannot show that because of their defect and the sale of them he has been unable to sell other goods of that kind. The consequence is too remote.<sup>3</sup> He may, however, recover the cost of putting the article in shape to fill a contract of which the contractor had knowledge when he undertook to manufacture it.<sup>4</sup> On the breach of a contract to furnish a specified quantity of steam daily as required for the purpose of a book bindery, the damages are not measured by the binder's loss of materials resulting from the insufficiency of the supply nor the wages paid his employees when they were idle, in the absence of proof that he was unable to obtain steam elsewhere or was prevented from filling contracts for work.<sup>5</sup>

## SECTION 2.

### CONTRACTOR AGAINST EMPLOYER.

[499] § 706. **Contract price.** The contract price, if there is one, or, if not, the reasonable value of what has been done is the measure of recovery where a contract for particular work has been performed. And the measure which the contract provides is not affected by payments made by strangers to it.<sup>6</sup> If the employer has furnished means for accomplishing the

<sup>1</sup> Chase v. Heaney, 70 Ill. 268;  
Smith v. Holmes, 54 Mich. 104. See

Appleby v. State, 45 N. J. L. 161.

<sup>2</sup> Stott v. Harrison, 73 Ind. 17.

<sup>3</sup> Loudy v. Clarke, 45 Minn. 477.

<sup>4</sup> Eagle Tube Co. v. Edward Barr Co., 16 Daly, 212.

<sup>5</sup> Russell v. Giblin, 16 Daly, 258;  
Manhattan Stamping Works v. Koehler, 45 Hun, 150.

<sup>6</sup> Miller v. Ward, 2 Conn. 494.

work at a price stipulated in the contract and this appears from the complaint, the contractor's recovery may be reduced to the extent of the agreed price without resorting to a plea of set-off.<sup>1</sup>

§ 707. **Demands for extra work.** Such demands are a common and prominent feature of the claims made under or in connection with contracts of this sort. The principal contest in respect to them is whether the work in question is extra, and whether it has been done under such circumstances that the employer is responsible for it. He cannot be made a debtor for such work without his consent. He should be informed that the work or material, for which he is sought to be made liable, before it was done or furnished, would constitute a claim of this nature, and knowing this, it should be established as a fact that the contractor had his authority for it.<sup>2</sup>

<sup>1</sup> O'Brien v. Anniston Pipe Works, 93 Ala. 582.

<sup>2</sup> Springdale Cemetery Ass'n v. Smith, 32 Ill. 252; Western U. R. Co. v. Smith, 75 Ill. 496; Chicago, etc. Ry. Co. v. Vosburg, 45 Ill. 311; Hart v. Norton, 1 McCord, 22; Wilmot v. Smith, 3 C. & P. 353; Jones v. Woodbury, 11 B. Mon. 169; Miller v. McCaffrey, 9 Pa. St. 245; Lovelock v. King, 1 M. & Rob. 60; Bartholomew v. Jackson, 20 Johns. 28; Dobson v. Hudson, 1 C. B. (N. S.) 652; Bailey v. Woods, 17 N. H. 365; Wildey v. School District, 25 Mich. 419; Wheeden v. Fiske, 50 N. H. 125; 2 Par. on Cont. 57; 2 Add. on Cont., § 870; Turner v. Grand Rapids, 20 Mich. 390; Hollinsead v. Mactier, 13 Wend. 276; Goldsmith v. Hand, 26 Ohio St. 101; Hasbrouck v. Milwaukee, 21 Wis. 217; In re Wood, 51 Barb. 275; Slusser v. Burlington, 47 Iowa, 300.

The case of Jones v. Woodbury, 11 B. Mon. 167, is very instructive on this subject. J. employed W., a carpenter, to build for him a frame house, the different apartments and dimensions of which were exhibited in a ground plan, and W. agreed to do the

work for \$600 or \$650, to be paid by the conveyance of a certain lot estimated at \$800; the excess to be [500] paid in carpenter work. The house was, in fact, built by W. and finished with the most costly work, and he made a claim therefor of upwards of \$3,000. Marshall, C. J., said: "Such an extraordinary excess above the contract can only be justified by the facts, to be established with reasonable certainty: 1st. That in the execution of the work there were corresponding departures from the original design, either in the plan and dimensions of the house, and the quantity of materials and labor, or in the quality of the materials and finish, or style of work, or in some or all of these particulars; and 2d. That these departures were directed by the employer, or assented to by him understandingly, with a knowledge, or at least with reason to believe, that they would greatly increase the cost of the building to him. When the builder has undertaken the erection of a house for another for a specified price, without specification as to the manner or



[503] It is also essential that the work which is claimed for as extra should be so; for if it was in truth covered by the con-

style of the work, it is his duty, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to apprise the employer of the difference in the cost. The employer may not know, and is not presumed to know, the gradations of price pertaining to the different modes or styles of finish. He relies and has a right to rely upon the undertaker of the work for information on this subject. And the latter, having undertaken to complete the house for a fixed price, cannot increase it *ad libitum*, merely on the ground that he was allowed to proceed with and complete the work according to his own judgment or taste, or that certain modes of work proposed by him pleased the fancy and met the approbation of the employer. *Prima facie*, the employer had a right to suppose, unless apprised of the contrary, that every proposition as to the different portions of the work is made under the contract for the whole, and is intended merely to present to him a choice of modes within that contract. And to get rid of this inference the undertaker must show either that he apprised the employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that it was of such a character as necessarily to carry this information to him. And as to costly work done in his absence and in a manner not previously approved by him, it is not sufficient to show that upon his return he was pleased with its appearance and did not order it to be removed or pulled down. The general principle applicable to the case of a special con-

tract for erecting a house, when in the progress of the work there have been alterations and additions not originally contemplated nor expressly provided for, seems to be that so far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be paid for as if there were no contract. But the safety of employers and the good faith proper to be observed in all cases requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate further that extra work, either in quantity or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such work than the contract price [501] bears to the measure and value price of the work contracted to be done. So that if the contract price was a fourth or a fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths or four-fifths of its price according to measure and value. . . . And we do not perceive how the verdict as to the amount can be sustained on any other principle than that of allowing for the work without reference to the contract price.

"The principal witness for the plaintiff, who was employed as his foreman in erecting the house, and who professes to be 'an architect,' and says that none but an 'architect' can understand the merits and value of the work done, referring to its earliest stage and certainly to a

tract, there would be no ground for asking compensation for it beyond that provided therein; and a promise to pay for it

period when no extra work was done, states that the ground plan being before the parties, he was requested to draw a front view of the house, not departing from the ground plan, on which he says was written, in the handwriting of the defendant, the statement that the work was to be done in a neat, plain and workmanlike manner; that he accordingly drew a front view, preserving the dimensions of the ground plan; that the plaintiff exhibited this drawing to the defendant, as presenting '*the front view of his house,*' without any intimation that it was a departure from the original plan or contract, or would require an increased expenditure, and that the defendant was much pleased with it. This drawing presents a very handsome front, and was, as we understand, substantially followed, though perhaps with some additional ornaments in the erection and completion of the building. But we cannot say, from the copy of it which accompanies the record, that it furnishes any information or definite idea as to the precise nature of the workmanship, or as to the cost, or that its approval by the defendant necessarily implied that he intended or was willing to give up his original contract, in order to have such a house as was represented in this drawing, without regard to the cost. The witness seemed to consider the approbation or adoption of this drawing as the plan for the front of the house as a total departure from the original plan in the style and manner of workmanship, and said that the presentation of it as the front view of the house, under the circumstances above stated, did not imply the intention or impose an

obligation on the part of the undertaker to construct the house according to this plan at the contract price, and that he knew of no custom among carpenters to that effect. One or two other witnesses concurred with him as to not knowing of such a custom. But several of the defendant's witnesses deposed that they understood such to be the custom. And the defendant's counsel asked for an instruction to the effect that if the jury believed the front view was presented to the defendant under the circumstances above stated, and that there was such a custom as that stated by defendant's witness, the law presumed the intention and understanding of the parties to have been in accordance with such custom: which instruction the court refused to give. And this refusal is complained of as erroneous.

"Independently of any custom on the subject, reason and good faith indicate the inference as a [502] matter of fact that when the undertaker of a house by special contract presents to his employer a drawing of his house, without intimating that it differs from the one which he expected and intended to build under the contract, the employer has a right to infer that it presents the plan of his house as it is to be built under the contract unless there be some circumstance in the plan itself or attending its presentation by which he is or should be clearly apprised that this is not to be expected. The existence of a custom in conformity with this natural and just inference might raise it to the dignity of a presumption of law. But the instruction in the form in which it was asked and without qualification

would be without consideration.<sup>1</sup> For all work done beyond the contract under prior direction or subsequent consent there is an undoubted liability.<sup>2</sup> But the mere fact of the defend-

would have excluded from the jury the inquiry whether by the plan itself or some other circumstance the defendant was not apprised that a house built according to that plan must cost more than the contract price; and whether, in fact, he did not approve or adopt the plan with that expectation. It might also have prevented the jury from giving due weight to subsequent facts or acts of the defendant tending to prove that he was aware in the progress of the work that there was a departure from the original design and estimate which must considerably enhance the cost, and that with this knowledge he approved of or directed these departures, and therefore should, to that extent, be bound to pay their reasonable value. We cannot say, therefore, that the court erred in refusing this instruction as asked. The law requires and intends to enforce good faith on both sides of such a transaction; and will no more hold the builder to the contract price, when by the authority or consent of the employer\* he has made alterations or additions which the latter knew would greatly increase the cost, than it will hold the employer to the full 'measure and value price' for such departures from the plan originally contemplated as he may have been drawn into the approval of, without knowing that they were departures, or without knowing that they would add materially to the cost. It was not necessary, however, that he should have actually or expressly directed the departures from the original plan. If he knowingly and understandingly assented or approved them when proposed, and

thus caused additional expense and labor, not comprised in the original design and estimate, he made himself justly liable to pay an additional sum therefor. . . . But on the other hand, it is not sufficient that he approved or assented to certain additions or alterations or departures proposed for his acceptance, and in some instances evidently with the design of captivating his fancy. He must, in order to make him liable on the ground of such approval or consent, have been apprised, either by direct communication of the fact or by the nature of the proposition, that the work proposed would be attended with increased cost to him."

In *Dubois v. Delaware & H. Canal*, 13 Wend. 334, the plaintiff had entered into an agreement for excavating a section of a canal; he was to receive a given price per cubic yard for ordinary excavation, but no price was stated for hard-pan. During the progress of the work a large quantity of the latter was excavated, a fair remuneration for which would exceed the highest price specified in the contract for any species of work. While the work was being done, the parties treated the excavation of hard-pan as not included in the contract; and after it was completed the employer conceded that the contractor was entitled to compensation for such work beyond the price fixed for ordinary excavation; it was held that the contractor was entitled to recover on a *quantum meruit*, and so much as he could show the work was worth.

<sup>1</sup> *Sweany v. Hunter*, 1 Murph. 181.

<sup>2</sup> *Fletcher v. Gillespie*, 3 Bing. 637; *Thornton v. Place*, 1 M. & R. 218;

ant having assented to certain alterations is not sufficient to make him liable to pay for them as extra work, unless their character be such that he must be aware that they will increase the expense, and cannot therefore be done for the contract price.<sup>1</sup>

The rate of compensation for extra work and materials should doubtless be that fixed by the contract so far as it can be made to apply; otherwise it will be determined as though no contract had been made,<sup>2</sup> as where they have been performed and furnished as the result of fraud.<sup>3</sup> If the work resulting from a change in the plans and specifications involves a substantially different undertaking from that originally contemplated, it is not within the contract, and the latter does not govern the compensation which may be recovered.<sup>4</sup> If the performance of extra work prolongs the time required to complete the contract and makes its execution more difficult and expensive, a rate of compensation in excess of that fixed by the contract may be recovered.<sup>5</sup> The contract may require deviations and extra work to be ordered in writing, still it will not place the employer under any disability to orally contract afterwards for new work, or for changes of the contract.<sup>6</sup> But it may operate to restrict the authority of an architect or other agent of the employer.<sup>7</sup> Money paid a contractor upon the principal contract cannot be set off against a claim for extra work.<sup>8</sup> Notwithstanding such contract is not fully performed and the balance unpaid is not recoverable, a recovery for extra work is not defeated.<sup>9</sup> If there is a deviation from the contract the recovery for the work consequently

Erskine v. Johnson, 23 Neb. 261; See McCormick v. Connolly, 2 Bay, 401; Wright v. Wright, 1 Litt. 179.  
Badders v. Davis, 88 Ala. 367. As to  
what constitutes ratification by officers of the federal government, see  
Ford v. United States, 17 Ct. of  
Cls. 60.

<sup>1</sup> Lovelock v. King, 1 M. & R. 60.

<sup>2</sup> Wheeden v. Fiske, 50 N. H. 125;  
Thornton v. Place, 1 M. & R. 218;  
Fletcher v. Gillespie, 3 Bing. 637;  
Ellis v. Hamlin, 3 Taunt. 52; Goldsmith v. Hand, 26 Ohio St. 101; Hollinsead v. Mactier, 13 Wend. 276;  
Jones v. Woodbury, 11 B. Mon. 169.

<sup>3</sup> Bush v. Brooks, 70 Mich. 446.

<sup>4</sup> Cook Co. v. Harms, 108 Ill. 151.

<sup>5</sup> Harrison Co. v. Byrne, 67 Ind. 181.

<sup>6</sup> Ford v. United States, 17 Ct. of  
Cls. 60; Escott v. White, 10 Bush,  
169.

<sup>7</sup> Thayer v. Vermont C. R. Co., 24  
Vt. 440; Herrick v. Belknap, 27 id.  
673.

<sup>8</sup> Woodward v. Fuller, 80 N. Y. 315.

<sup>9</sup> Griffin v. Miner, 54 N. Y. Super.  
Ct. 46.



performed cannot exceed the extra cost of doing it. The contractor has the *onus* of showing that the expense was increased, and the amount of the increase.<sup>1</sup>

§ 708. **Recovery on part performance of severable contract.** Where a special contract has been entered into and the contractor has not fully performed his part, his right [504] of recovery will depend on its nature as to being entire or severable; the cause of short or imperfect performance on his part, and the conduct of the employer. If the contract is severable, so that for part performance an instalment or portion of the compensation is expressly or by construction made payable before the residue of the work is done, an action may be brought therefor when due, and the right to recover it will not be otherwise affected by subsequent defaults or infractions of the contract than by reduction by recoupment or counter-claim.<sup>2</sup>

A more liberal rule is adopted in some states than in others in determining whether contracts are severable. Thus it has been laid down in Vermont that where one party contracts to do a job of work, and another to pay a stipulated price for it, and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and full performance not a condition precedent to a right of action unless it be so expressly stipulated or inferable by strong implication. In such cases the party performing in part will recover the stipulated price *pro tanto*, deducting damages sustained by the other from the failure to perform the entire contract.<sup>3</sup> And so in Virginia and Texas it has been ruled that covenants, though dependent in form, will be construed as mutual and independent when it is necessary to effect justice between the parties. A party having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done as upon an independent covenant.<sup>4</sup> And in North Carolina it was held that where a

<sup>1</sup> Nason Manuf. Co. v. Stephens, 137 N. Y. 602. v. Fries, 19 Barb. 313. But see Cox v. Western P. R. Co., 44 Cal. 18.

<sup>2</sup> Goldsmith v. Hand, 26 Ohio St. 101; Sickels v. Pattison, 14 Wend. 257; Lord v. Belknap, 1 Cush. 279; Crabtree v. Hagenbaugh, 25 Ill. 233; Ricker v. Fairbanks, 40 Me. 43; Snook v. Tyson, 15 Vt. 515. See Snook v. Fries, 19 Barb. 313; Ricker v. Fairbanks, 20 Me. 43.

<sup>4</sup> Todd v. Summers, 2 Gratt. 167. In this case a parol agreement was

contract for the performance of work is divided into three separate and distinct parts, there is no reason why the plaintiff should not recover for work done on the first two, according to it, though the third part was not finished.<sup>1</sup> So in Georgia it was held that if A. contract with B. to repair different parts of a machine and two frames for spindles, the one not being dependent at all for its use upon the completion of the other, and the former is repaired and received by the owner, he cannot make the failure to deliver the others an excuse for not paying for that which is finished and accepted.<sup>2</sup> In Pennsylvania also a like view has been declared: "A mutual or dependent covenant, which goes but to a part of the condition on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. Its non-performance will not necessarily bar the entire right of the plaintiff. So, too, a covenant which is in form entire, but in truth embraces a variety of acts more or less essential to the whole performance, may be so discharged as to sustain an averment of performance though a literal compliance cannot be alleged."<sup>3</sup> But in New York, in a comparatively late case, a contract had been made by the plaintiff to make for the defendant three or four models of a mowing machine without delay; no price had been agreed on, nor when the models should be paid for. It was held that the contract was entire for three models, and the plaintiff having made and delivered one only was not entitled to recover for it although it had been accepted.<sup>4</sup> And in *Stephens v. Beard*<sup>5</sup> it was held that, where one party agreed to saw by a given time three hundred thousand feet of boards at a stipulated price

made in April, 1838, by which S. agreed to sell to T. his interest in a piece of land. T., in return, agreed to make 50 M. good staves for S. (but S. to saw the timber) by Christmas, and 25 M. more by May following. T. had been put in possession of the land and continued to hold it. S. was held entitled to recover for T.'s failure to make the staves, though S. had not sawed the timber, T. having the right to recoup damages against

S. for his failure to saw it. *Carroll v. Welch*, 26 Tex. 147.

<sup>1</sup> *Brewer v. Tyson*, 5 Jones' L. 173.

<sup>2</sup> *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416.

<sup>3</sup> *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 159; *Chambers v. Jaynes*, 4 id. 39.

<sup>4</sup> *Sharpe v. Johnson*, 41 How. Pr. 400. See *Cunningham v. Jones*, 4 Abb. 433.

<sup>5</sup> 4 Wend. 604.

per thousand, and failed to saw the whole quantity, that though he had sawed one hundred and forty-four thousand feet, which had been received by the other party, compensation for sawing this quantity could not be set off against the claim for damages for the omission to saw the residue. Sutherland, J., said: "The plaintiff claims damages for the neglect or refusal of the defendant to saw the one hundred and fifty-six thousand feet of boards, parcel of the three hundred thousand which he had agreed to saw. The defendant admits the violation of his contract, and that so far as the one hundred and fifty-six thousand are concerned, the plaintiff had sustained damage by his non-performance, at least to the amount of \$100. But then he says, I performed the residue of the contract and sawed for him one hundred and forty-four thousand feet, my services in doing which were worth to him \$2 per thousand feet by his own admission; and, in estimating his damage, in consequence of my partial non-performance, the benefit received by him for my partial performance is to be taken into account, and to be deducted. This reasoning must be fallacious. The fallacy, I apprehend, is this: The action, though in form it alleges an entire breach of the contract, is in fact for the omission of the defendant to saw the one hundred and fifty-six thousand feet, and the claim of damages is confined to that. The defendant has the benefit of his partial performance; having been accepted by the plaintiff, it is *pro tanto* an answer to his action, and leaves the parties in the same condition as though the contract had been to saw one hundred and fifty-six thousand feet, and had been entirely unperformed. The defendant cannot in this indirect manner recover for services which by the established principles of law he cannot recover for directly." The following case seems to be decided on the opposite view of the law. The plaintiff voluntarily and without cause abandoned a contract to build a house before its completion and sued to recover the contract price. The defendant presented in offset a claim for work done and expense incurred by himself to complete the job, and for damages for the non-completion thereof by the plaintiff, and this set-off or counter-claim was allowed by the referee. And it was held that thereby the defendant received an equivalent for the performance of the contract, and that

the plaintiff was, therefore, entitled to recover the contract price.<sup>1</sup>

A contract which was entire when made may be severed by the subsequent acts of the parties; payments made, or sums promised absolutely on it, may be retained or collected, though the work has not been done which by the contract was a condition precedent.<sup>2</sup> In *Hayden v. Madison* <sup>3</sup> a contract [507] to build a road was let, one-half the price to be paid when it was completed, and the other half a year afterwards. The larger part of the work was done, but it was not finished. The employer made the first payment with knowledge of these facts. In a suit brought afterwards for the contract price and on a *quantum meruit* for as much as was done, it was held that making the payment was a waiver of the terms of the special contract, and the plaintiff was entitled to recover on the latter count; that to ascertain the sum to be recovered the contract price should be taken as the true value of the whole work agreed to be done. In *Williams v. Colby* <sup>4</sup> it was held that the defendant, having voluntarily made payments after the completion of the work contracted for, could recover nothing back, though it was found that the work was imperfectly done; that such payments were a waiver of all claims for damages to the extent thereof. In Texas it was held that where a party employs a mechanic to do a certain job of work and pays him in advance, and the work is suspended for want of materials, or other cause, at the instance or by the default of the employer, the right of the mechanic is not to retain the full price, but to reconvene for the damages actually sustained by the failure of the employer to perform his part of the contract.<sup>5</sup>

### § 709. Demands for part performance of entire contract.

If a contract which is entire, after part performance, is rescinded by the mutual consent and act of the parties as to the residue, or further performance is prevented by law or the act of God without the fault of either party, the contractor

<sup>1</sup> *Austin v. Austin*, 47 Vt. 311.

<sup>4</sup> 44 Vt. 40.

<sup>2</sup> *Walker v. Millard*, 29 N. Y. 375.  
See *Meyer v. Hallock*, 2 Robt. 284.

<sup>5</sup> *Hood v. Raines*, 19 Tex. 400. See  
*Hansbrough v. Peck*, 5 Wall. 497;  
*Wells v. Selwood*, 61 Barb. 233.

<sup>3</sup> 7 Me. 76.



may recover on a *quantum meruit* for what he has done.<sup>1</sup> In [508] such case neither party is in fault, and therefore is not responsible to the other for failing to fulfill. In a recovery on a *quantum meruit* there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he recovers such part of the entire amount as is equal to the part he has performed of the whole contract. It often occurs that a partial rescission results from deviation from the original plan and contract made by deliberate and explicit direction of the employer, or with his consent or acquiescence, and by such departures other work is substituted with other prices agreed to or implied. In such cases the omission of the particular work excluded by the substitution is not a violation of but is dispensed with by modifying the contract, and may involve a reasonable, but indefinite, extension of time. The contractor may then be entitled to recover the contract price, with such increase or subject to such diminution as is produced by the change of plan, on a *quantum meruit*.<sup>2</sup> The action may be brought on the contract when the contractor can show that he has substantially performed his part, except as he can allege and prove the legal excuse of being prevented by the employer, the act of God or the law, but not otherwise.<sup>3</sup> It would be

<sup>1</sup> Hall v. Ripley, 10 Pa. St. 231; Wright v. Wright, 1 Litt. 179; Morfogland v. Moore, 2 Blackf. 167; Allen v. Ambrose, 3 J. J. Marsh. 688; Algeo v. Algeo, 10 S. & R. 235; Moulton v. Trask, 9 Met. 577; Melville v. De Wolf, 4 El. & Bl. 844; S. C., 82 Eng. C. L. 844; Bannister v. Reed, 6 Ill. 100; Wright v. Haskell, 45 Me. 492; Canada v. Canada, 6 Cush. 18; Webster v. Enfield, 10 Ill. 298; Selby v. Hutchinson, 9 id. 319; Leonard v. Dyer, 26 Conn. 177; Green v. Haley, 5 R. I. 260; Derby v. Johnson, 21 Vt. 17; Jones v. Mial, 89 N. C. 89.

<sup>2</sup> Goldsmith v. Hand, 26 Ohio St. 100; Delaware & H. Canal Co. v. Dubois, 15 Wend. 87; Wheeden v. Fiske, 50 N. H. 125; Bailey v. Woods, 17 id. 365; Hart v. Lauman, 29 Barb. 410; De Boom v. Priestly, 1 Cal. 206; Wright v. Wright, 1 Litt. 179; Morfogland v. Ambrose, 3 J. J. Marsh. 688; Allen v. McNew, 8 Humph. 46.

<sup>3</sup> In Smith v. Gugerty, 4 Barb. 614, Strong, J., discusses the meaning of a *substantial* compliance with the contract. He says: "No builder ever does or can comply with every minute requisition; a brick, a stone, a nail, a shingle or board may have some slight defect which might have been almost, and perhaps entirely, imperceptible, until it has been fixed in its place, and it had become impossible to remove it; or it may happen that a minute portion of mortar, among a large mass, may not have been mixed precisely in the required proportions, and the

illogical and contrary to the case stated to allow a re-covery except upon proof of performance of the precedent condition. To recover for part performance on any other explanation or excuse for not having fully executed the contract requires a different declaration, a *quantum meruit* count. Nor can general *assumpsit* be maintained for work done under a special contract which is still unperformed and not rescinded; the principle is that where there is an express

difficulty may not be discovered until it is too late to change it. Such things will constantly occur, unless men should become more perfect in their powers of perception and discrimination than they are at present. If there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he may not (as the architect employed in this case certified) have in every instance complied with its terms 'literally in every punctilio.' A substantial compliance, without any intentional variation, should in all cases be considered as a full performance of a condition, whether precedent or subsequent." See *Estep v. Fenton*, 66 Ill. 467; *Taylor v. Beck*, 13 id. 376.

In *Crane v. Knubel*, 61 N. Y. 645, it was held that where, by the terms of a contract, the performance of certain specified work is a condition precedent to payment, a failure upon the part of the contractor to perform in any particular, if wilful and without excuse, will prevent a recovery for the work done. In such case the comparative extent of the default will not be inquired into. H. and the defendant entered into a contract under seal, by which H. contracted to do the carpenter work on two buildings for defendant; an instalment was to be paid H. when a

certain specified part of the work was done. He gave the plaintiff an order on the defendant, to be paid when the work was done; the defendant accepted it accordingly. Before the completion of the work so specified, H. abandoned the contract. Defendant thereafter, on presentation of the order, promised to pay it. The order was not for the whole amount of the instalment, and the residue was more than sufficient to pay for the completion of the work. In an action to recover the amount of the order it was held that, the promise being without consideration, the performance of the condition precedent was not thereby waived; nor was the defendant estopped from alleging non-performance, and the plaintiff could not maintain his action.

In *Smith v. Brady*, 17 N. Y. 173, it appeared that the work sued for on the special contract had not been quite performed; that it would cost a little over \$200 to complete it. The court held the contract not substantially fulfilled, intimating that a substantial performance only ignored those defects which were such trifles as the law did not notice; one member of the court, however, advanced the opinion that a substantial compliance with the contract might have been certified. See *Chambers v. Jaynes*, 4 Pa. St. 39; *Cornell v. Vanartsdalen*, id. 364.

promise none can be implied.<sup>1</sup> This principle is generally followed and strictly enforced where the special contract has been intentionally or fraudulently violated or abandoned by [510] the contractor.<sup>2</sup> An exception has been admitted and recovery for part performance allowed on a *quantum meruit* where the employer, notwithstanding a failure to fulfill in point of time, has permitted the contractor, without objection, to proceed with the work;<sup>3</sup> or, knowing of the breach by delay or imperfect work, has voluntarily appropriated and derived a benefit from it.<sup>4</sup> If the builder has done a large

<sup>1</sup> *Jennings v. Camp*, 13 Johns. 94; *Lawrence v. Simons*, 4 Barb. 354; *Raymond v. Bearnard*, 12 Johns. 274; *McMillan v. Vanderlip*, id. 165; *Chambers v. King*, 8 Mo. 517; *Shepard v. Palmer*, 6 Conn. 94; *Dermott v. Jones*, 2 Wall. 1; *Clark v. Smith*, 14 Johns. 326; *Cutter v. Powell*, 2 Smith's Lead. Cas. 17 *et seq.*; *Jones v. Mial*, 89 N. C. 89.

<sup>2</sup> *Elliott v. Caldwell*, 43 Minn. 357; *Dermott v. Jones*, 2 Wall. 1; *Sinclair v. Tallmage*, 35 Barb. 602; *Smith v. Gugerty*, 4 id. 614; *Gleason v. Smith*, 9 Cush. 484; *Gilman v. Hall*, 11 Vt. 510; *Snow v. Ware*, 13 Met. 42; *Walker v. Orange*, 16 Gray, 193; *Veazie v. Bangor*, 51 Me. 509; *Merrill v. Ithaca, etc. R. Co.*, 16 Wend. 582.

<sup>3</sup> *Phillips, etc. Const. Co. v. Seymour*, 91 U. S. 646; *Gallagher v. Nichols*, 16 Abb. (N. S.) 337; *Sinclair v. Tallmage*, 35 Barb. 602; *Merrill v. Ithaca, etc. R. Co.*, 16 Wend. 586; *Ladue v. Seymour*, 24 id. 60; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Wolfe v. Parham*, 18 Ala. 441; *Simpson v. McDonald*, 2 Ark. 570; *Farmer v. Francis*, 12 Ired. 282; *Hayden v. Madison*, 7 Me. 76.

<sup>4</sup> *Veazie v. Bangor*, 51 Me. 509; *Dermott v. Jones*, 23 How. (U. S.) 220; *S. C.*, 2 Wall. 1; *Williams v. Porter*, 51 Mo. 441; *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416; *Denmead*

*v. Coburn*, 15 Md. 29; *Bishop v. Price*, 24 Wis. 480; *Hyde v. Booraem*, 16 Pet. 169; *Clayton v. Blake*, 4 Ired. 497; *Jewett v. Weston*, 11 Me. 346; *Norris v. School District*, 12 Me. 293; *Newman v. McGregor*, 5 Ohio, 349; *Barker v. Rutland & W. R. Co.*, 27 Vt. 766; *Elliott v. Wilkinson*, 8 Yerg. 411; *Horn v. Batchelder*, 41 N. H. 86; *Bertrand v. Byrd*, 5 Ark. 651; *Cardell v. Bridge*, 9 Allen, 355; *Hawkins v. Gilbert*, 19 Ala. 54; *Conery v. Noyes*, 17 La. Ann. 201; *English v. Wilson*, 34 Ala. 201; *Allen v. McKibbin*, 5 Mich. 449; *McKinney v. Springer*, 3 Ind. 59; *McClure v. Secrist*, 5 Ind. 31; *Barkalow v. Pfeffer*, 38 Ind. 214; *B. & O. R. Co. v. Lafferty*, 2 W. Va. 104; *Smith v. Gugerty*, 4 Barb. 614; *Taylor v. Merryweather*, 15 Ala. 735; *Escott v. White*, 10 Bush, 169; *Porter v. Woods*, 3 Humph. 56; *Hayward v. Leonard*, 7 Pick. 181; *Lord v. Belknap*, 1 Cush. 279; *Adlard v. Muldoon*, 45 Ill. 193; *Van Buskirk v. Murden*, 22 Ill. 446; *Austin v. Austin*, 47 Vt. 311; *Morrow v. Huntoon*, 25 id. 9; *Basset v. Sanborn*, 9 Cush. 58; *Cullen v. Sears*, 112 Mass. 299; *Jewell v. Schroepel*, 4 Cow. 564; *Eddy v. Clement*, 38 Vt. 486; *Dyer v. Jones*, 8 Vt. 205; *Hennessey v. Farrell*, 4 Cush. 267; *Walker v. Orange*, 16 Gray, 193.

If the special contract has been

and valuable part of the work he undertook, but yet has failed to complete the whole, or any specific part, within the time limited by his contract, the other party, when that time arrives, has the option of abandoning the contract for [511] such failure or of permitting the party in default to go on. If he abandons it and notifies the other party, the failing contractor cannot recover on the contract, because he cannot make or prove the necessary allegations on his part. But if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable for the contract price of the work, less such damages as he has sustained from the contractor's failure to fulfill the contract within the stipulated time.<sup>1</sup> Similar considerations will raise a duty to pay for work done in good faith towards the fulfillment of a contract, notwithstanding deviations from it, where the employer is aware of such departures and does not object to them or accepts the work after it is done and derives a benefit from it. He is liable to pay the contract price if the contract can, or so far as it can, be applied to the work, deducting therefrom such damages as will compensate the employer for the defects in the work or materials, or for his disappointment in not having the work done in the very manner stipulated for; and so far as the contract cannot be traced in or applied to the work it will be estimated without regard to it; but the employer should not lose by the violation of the contract nor the contractor gain by it. On the whole, the employer should have such deduction made from the contract price as will be equal to the difference between the value of the work agreed to be done and the work actually done.<sup>2</sup>

performed or is at an end by an act of the employer, the contractor can recover for what he has done in general *assumpsit*. *Bassett v. Sanborn*, 8 Cush. 58, 66, 67; *Western v. Sharp*, 14 B. Mon. 177; *Escott v. White*, 10 Bush, 160.

<sup>1</sup> *Phillips, etc. Const. Co. v. Seymour*, 91 U. S. 646.

<sup>2</sup> *Farmer v. Francis*, 12 Ired. 282.

The question discussed in the text has been decided in New Jersey for the first time in a comparatively late case, and the conclusion reached that "when a contract for erecting a building has not been so performed that a recovery can be had thereon, a recovery in *assumpsit* upon the common counts for work and materials furnished in the erection will



§ 710. **Same subject.** The inquiry is not what, under other circumstances, the contractor would be entitled to recover, but what is he entitled to in reference to the contract price, and the damages sustained by the employer in consequence of the want of a strict performance on the part of the plaintiff.<sup>1</sup> The employer may introduce evidence of the amount necessarily expended by him in getting the work completed;<sup>2</sup>

only be permitted when the owner has actually accepted the building erected. The view that assumes acceptance from the mere fact that the edifice adds value to the land on which it stands," in the judgment of the writer of the opinion, "unduly restrains the force of the contract of the parties and deprives the owner of the right to reject an edifice not in substantial conformity with its terms. If thereby any apparent injustice seems done to the builder in retaining the materials put upon the property, it is the result of his own default, to which he must submit. Such acceptance by the owner may be express or implied from his conduct. It seems well settled that mere occupancy of the building by the owner, while appropriate, is neither presumptive nor conclusive evidence of acceptance. The reason is obvious. The building belongs to the owner of the land on which it stands. As was said by Lord Campbell in *Munro v. Butt*, 8 El. & Bl. 738, the owner cannot be appropriately said to take possession of the building, for he has not been out of possession of that which is thus affixed to his own land." *Bozarth v. Dudley*, 44 N. J. L. 304.

<sup>1</sup> *Ladue v. Seymour*, 24 Wend. 60.

<sup>2</sup> *Clark v. Russell*, 110 Mass. 133; *Colton v. Good*, 11 Up. Can. Q. B. 153; *Lamoreaux v. Rolfe*, 36 N. H. 33.

After the breach of such a contract, evidence of a subsequent agree-

ment between the plaintiff and third persons, and the amount to be paid for the performance of the same services, but which agreement is not carried out, is not competent as tending to show the amount of damages; otherwise if the services had been performed under such agreement. The court say by Eastman, J.: "The value of property may be shown by actual sales of the property itself, or of similar property situated under like circumstances. Such is the settled rule in this state. *Whipple v. Walpole*, 10 N. H. 130; *Beard v. Kirk*, 11 N. H. 397; *White v. Concord Railroad*, 30 N. H. 188. So an offer to sell property by the owner may be evidence against him as tending to show that the property was worth no more. *Hersey v. Ins. Co.*, 27 N. H. 149. It is in the nature of an admission on his part as to its value. Upon the like principle it is competent to show the price paid for doing certain or similar labor, as tending to prove the value of the labor. And, as against a party an offer by him to perform the work would be admissible as showing what it was worth. But the evidence used upon the trial in this case does not fall within this principle. It does not appear that the work was ever performed, . . . or that the contract . . . was ever carried into effect. The evidence was not used against the party making the contract but in his favor." *Lamoreaux v. Rolfe*, *supra*.

or of what it would cost to complete it.<sup>1</sup> And where [512] a reduction of the contract price is sought by evidence that the work was not properly done, it is not competent for the contractor to prove in answer that it would have been worth more than that price to have done it in a workmanlike manner.<sup>2</sup> Nor is the amount saved to the employer by letting a new contract to complete the work the test of the amount equitably due the prior contractor for work done and material furnished under a contract he has failed to complete.<sup>3</sup>

Where there are damages to the employer, growing out of the non-performance of the contract, which do not enter into the contract price he may recoup them in the contractor's action upon a *quantum meruit*.<sup>4</sup> Thus, where a plaintiff had entered into a contract with a railroad company to construct for them a swinging draw-bridge over a river, in accordance with a submitted plan and tracings, for a stipulated price, in an action for the price the company set up alleged defective construction of the bridge, and consequent delays and expenses, and claimed by way of recoupment the resulting damages. On the trial the deposition of a witness was [513] offered, to whom interrogatories had been put, inquiring whether the structure and arrangement of the bridge caused any injury or damage, hindrance or delay to the company in running the road; and whether hindrance or delay was caused by the imperfect construction of the bridge to any vessel navigating the river; and whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river; and what number of hands were required to work the draw-bridge, and what number would be needed if it had been properly constructed; and it was held that the interrogatories were proper and pertinent in themselves; that the objection that they related to speculative damages did not apply to the first and last, in which the damages would be capable of actual estimation; and that the facts sought would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the con-

<sup>1</sup> Gonzales College v. McHugh, 21 Tex. 256.

<sup>2</sup> Williams v. Keech, 4 Hill, 168.

<sup>3</sup> Michigan Paving Co. v. Detroit, 84 Mich. 201.

<sup>4</sup> Allen v. McKibbin, 5 Mich. 449.

tractor's demand.<sup>1</sup> The right to recover on a *quantum meruit* for a *bona fide* part performance is not precluded by the fact that by the contract under which the work was done payment was to be made otherwise than in money, if the employer has refused to make compensation in the mode provided.<sup>2</sup>

On the completion of the work, or such part of it as the contractor performs, if the employer may reject it without giving up his own property on which the labor has been bestowed, and thus decline any benefit from it, his omission to [514] exercise that privilege, and his reception, use and appropriation of the work, afford undoubted ground of recovery for it on reason and authority. If the work has not been done in conformity to the contract the employer is not obliged to receive it, and if he does not he incurs no liability for it. And where he signifies his rejection of work which has been done for him upon his own property under a special contract, but not in accordance therewith, and gives the contractor permission to take to himself or retain the property upon which the work has been done, on paying for it, there is no acceptance by a voluntary appropriation of the insufficient work; and where such a rejection is practicable, there ought to be no liability if the employer avails himself of this method of avoiding it. Such a rejection is not always practicable; when it is not,—when the employer must receive the benefit as the work progresses, and in advance of any deviations from the contract, and he acts promptly to make and enforce his objection when there is defective work or delay, there is no

<sup>1</sup> *Railroad Co. v. Smith*, 21 Wall. 255.

<sup>2</sup> *Bassett v. Sanborn*, 9 Cush. 58.

In *Barker v. Rutland & W. R. Co.*, 27 Vt. 766, the contractor was to receive in payment a certain proportion of the defendant's stock. Upon finishing his work he demanded his pay, claiming that his contract had been performed; this was denied by the defendant, and on that account payment was refused. The market price of the stock at this time was thirty-three per cent. of its par value. It being determined that the plaintiff

was entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of the contract, but upon equitable grounds, his recovery of that part of his claim which was made payable in stock, it was held, should be limited to the market value of the stock at the time of the demand. But see *Roberts v. Wilkinson*, 34 Mich. 129; *Clark v. Fairchild*, 22 Wend. 576; *Mitchell v. Gile*, 12 N. H. 390; *Fitch v. Casey*, 2 G. Greene, 300; *Weart v. Hoagland*, 22 N. J. L. 517; *Harrison v. Lake*, 14 M. & W. 139.

ground of voluntary acceptance for holding him liable otherwise than by the terms of the special contract. On the other hand, the want of objection and apparent acquiescence where there is knowledge of the actual character of the work would be a fraud on the contractor if he were thus encouraged to proceed, and still be at the hazard of losing all compensation except on terms of showing a punctilious performance of the contract. It is not the duty, however, of the employer to watch the progress of work under a special contract to see that it is in all respects conformable to its requirements, unless this duty is imposed by the contract. Hence, in many cases, erections on the employer's land are contracted for, or work on his materials, and no inspection is made or required to be made before the work is offered for acceptance as complete; then objections may be freely made. The employer may retain and take the benefit of the work, because it is done on his land or materials. He is not required to abandon his property in order to reject the work. It has often been held that if objections are made at that time by the employer, indicating that he is not satisfied with the work, or even keeps silent, and there is no intention in fact to waive objections, he may use and derive benefits from the work without hav- [515] ing such use construed as an acceptance by which he becomes liable to pay for it upon an implied *assumpsit*.<sup>1</sup> In some states and particularly in New York, formerly, the employer had the right to insist on a strict performance of a building contract by which a building is to be erected on the employer's land, and might successfully resist the collection of any compensation until the performance of the condition precedent, or an intentional waiver of objections, however beneficial the actual performance may have been. The mere occupation of a building, in such a case, was not a waiver of strict performance of the contract for its erection. The employer was entitled to retain, without compensation, the benefit of a partial performance, where, from the nature of the contract, he must receive such benefit in advance of a full performance, and was by the contract under no obligation to pay until the performance was complete.<sup>2</sup> The rule has been relaxed in

<sup>1</sup> *Zottman v. San Francisco*, 20 Cal. 96.

<sup>2</sup> *Smith v. Brady*, 17 N. Y. 173; *Brown v. Weber*, 38 id. 187; *Adlard*



New York, so that where a builder has in good faith intended to comply with his contract, and has substantially done so, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of the defects.<sup>1</sup> This is substantially the rule of the Minnesota court.<sup>2</sup> The principle does not extend to a case in which the defect runs through the whole building, or is of such a nature that the object of the parties to have a specified amount of work done in a particular way is defeated.<sup>3</sup>

§ 711. **Same subject.** It is necessary in California, in order that this doctrine of liability upon an implied contract may be applied, not only that there be no restrictions imposed by law upon the party sought to be charged against making in direct terms a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept the work, and where such election will or may influence the conduct of the other party with reference to the work itself.<sup>4</sup> But there is generally a more liberal consideration of the equitable rights of the contractor where he has in good faith endeavored to comply with his contract, and his labor has added value to his employer's property, and a benefit necessarily accrues to him. Independently of any election to accept, the honesty of the contractor's efforts towards full performance, the beneficial character of the work, and the impossibility of the employer declining and rejecting it so that the contractor may make it useful to himself, have induced the courts to adopt the rule of awarding compensation to the contractor to the extent that the employer is thus benefited. As early as [516] 1828 this rule was acted upon in Massachusetts, and it has been repeatedly approved in later cases there as well as elsewhere. It was thus stated as a question on which there

v. Muldoon, 45 Ill. 193; Bozarth v. Dudley, 44 N. J. L. 304, quoted from *supra*, § 709, n.; Robinson v. Bullock, 66 Ala. 548.

<sup>1</sup> Woodward v. Fuller, 80 N. Y. 312; Johnson v. De Peyster, 50 id. 666; Glacius v. Black, id. 145; Phillips v. Gallant, 62 id. 264; Heckmann

v. Pinkney, 81 id. 211; Morton v. Harrison, 52 N. Y. Super. Ct. 305; Nolan v. Whitney, 88 N. Y. 648.

<sup>2</sup> Leeds v. Little, 42 Minn. 414.

<sup>3</sup> Phillips v. Gallant, 62 N. Y. 264; Woodward v. Fuller, 80 id. 312.

<sup>4</sup> Zottman v. San Francisco, 20 Cal. 96.

were many conflicting opinions: "Whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on the contract; yet, nevertheless, the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them so as in all events he shall lose nothing by the breach of the contract."<sup>1</sup>

The doctrine is firmly established in Vermont that where a contract has been substantially, though not strictly, performed; where the party failing to perform according to its terms has not been guilty of a voluntary abandonment or wilful departure therefrom, has acted in good faith, intending to perform according to the stipulations, and has failed in a strict compliance with its provisions; and when, from the nature of the contract, and of the labor performed, the parties cannot rescind and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other, in such cases the party failing to perform strictly may recover of the other as upon a *quantum meruit* for such sum only as the contract, as performed, has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work. The rule is treated as a relaxation from the strictness of the ancient law, [517] standing upon the solid ground of necessity and equity, but to be guarded with care, lest in its application it should tend to impair the obligation and faithful performance of agreements. The contractor must have intended in good faith to fulfill the terms of the contract; its spirit must be faithfully

<sup>1</sup> Hayward v. Leonard, 7 Pick. 181; Orange, 16 id. 193; Morse v. Potter, Smith v. First Cong. Meeting House, 4 id. 292; Powell v. Howard, 109 8 id. 178; Bassett v. Sanborn, 9 Cush. Mass. 192; Cullen v. Sears, 112 id. 58; Snow v. Ware, 13 Met. 24; Cardell 299; Atkins v. Barnstable, 97 id. 428; v. Bridge, 9 Allen, 355; Walker v. Clark v. Russell, 110 id. 133.

observed, though the very letter of it fail. A voluntary abandonment or a wilful departure from its stipulations is not allowed. The principle applies only in cases where the contract cannot be rescinded, and where, from its nature, the labor performed under it must inure to the benefit of the employer, and it would be inequitable for him to retain it without making compensation. The party failing to perform can only recover such a sum as his labor has benefited the other. Had he strictly and literally kept his agreement he would have been entitled to the contract price. Failing in this — 1st, he must deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; — or, where that is impossible or unreasonable, such sum as will fully compensate him for the imperfection in the work, and the insufficiency of the materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed; 2d, he must also deduct from the contract price whatever additional damages his breach may have occasioned to the [518] other.<sup>1</sup> The substantial performance which is mentioned as requisite to bring a case within this equitable prin-

<sup>1</sup> Kelly v. Bradford, 33 Vt. 35. See Brackett v. Morse, 23 id. 554; Kettle v. Harvey, 21 id. 301; Morrison v. Cummings, 26 id. 486; Hubbard v. Belden, 27 id. 645; Barker v. Troy & R. R., 27 id. 780; Swift v. Harriman, 30 id. 607; Eddy v. Clement, 38 id. 486.

In Dyer v. Jones, 8 Vt. 205, Redfield, J., said: "Where, from the nature of the contract, it is impossible to put the parties in *statu quo*, as where A. builds a house or wall on B.'s land, or, as in the present case, where labor has been performed on the plaintiff's land by defendant, from which the plaintiff will and must derive some benefit, and which cannot be transferred to defendant, the party really entitled to it, it has been held that the party performing the labor might recover so much *only* as the labor is worth to the

party who *must* have the *benefit* of it. This rule is adopted *ex necessitate*, to prevent one party gaining an unconscionable advantage over the other. The failure to perform the contract strictly according to its terms may have been rather the misfortune than the fault of the party, but it forever precludes a recovery *upon the contract*, for a strict performance is a condition precedent to any right of action. But the laborer is entitled to his own labor or its product, where it is in a shape that he can carry it away. In this case he cannot. Hence the rule has been adopted that the laborer may recover as on a *quantum meruit*, or in strictness what the labor is worth to the defendant, and no more. Otherwise the party benefited would owe no equivalent, and the party laboring would be without all remedy."

ciple is not that near approach to perfect and complete fulfillment of the contract which is necessary to entitle the contractor to recover on it. In one case the contractor was reported to deserve about half price and was allowed to recover.<sup>1</sup> In another he agreed to build a stone wall four and a half feet high, and more than half of it was less; but it was held that the contract was substantially performed for the purpose of that remedy;<sup>2</sup> and in a later case a written contract was made to construct a road and bridge for the defendant, which specified in detail the length, width and mode of construction of both, and required that the whole work should be done in a thorough, workmanlike manner, and be completed to the satisfaction and acceptance of the defendant's selectmen by a specified date, at which time, in consideration of such completion, the defendants agreed to pay for the same. By this contract the road was to be built sixteen feet wide and upon a line marked out; as built it varied from that line in some places two or three feet, and in others it was not so wide in the rock cuts as it was stipulated to be. There was a defect in the bridge, in the interlocking of the long timbers or chords; they were not put together with sufficient strength and thoroughness of workmanship to bear the strain that was to come upon them. As to this the court say: "This defect [in the bridge] would not at first be apparent. After the bridge had been used and subjected to severe tests by the drawing of heavy loads of stone over it, the defect began to appear. In the outset a slight additional expense would have probably remedied the insufficiency, but after the arch by use for some six months had become depressed to a level, the expense of restoring it, and making it as safe and durable as the contract required, was much more. It seems to [519] us that the failure in this point, clearly not from design, but rather the misjudgment and misfortune of the plaintiffs, should not subject them to a total loss of their labor. So severe a rule would hardly be consistent with a reasonable regard for the infirmity of human nature, and for that liability to mistake and failure which attends upon the best efforts of wise and skilful men. The defects in the making of

<sup>1</sup> *Dyer v. Jones*, 8 Vt. 205.

<sup>2</sup> *Gilman v. Hall*, 11 Vt. 510.



the road seem to have been of still less significance: a divergence from the exact line staked out by the selectmen, but not thereby appearing to work any actual inconvenience; insufficiency in the construction of a bank wall; imperfections in making the road narrower than the contract required in some places, and not bringing it to the exact grade specified. But since the plaintiffs claimed the road as completed, it has been used by the public, and these defects do not seem to have impaired its use or convenience, or to have occasioned actual damage to any one.”<sup>1</sup>

The principle enunciated in these cases has been applied in Connecticut in a recent case. It is there held by a majority of the court that, if the result of a builder's labor is a structure adapted to the purpose for which it was designed, and the employer is in the use and enjoyment of it, and it cannot be made to conform to the contract otherwise than by the expenditure of a sum which would deprive the contractor of all compensation for his labor, a deduction may be made from the contract price to the amount of the diminution in value of the building, and not the amount it would cost to make it conform to the contract.<sup>2</sup> Principles more or less liberal have been declared in other states in favor of defaulting contractors who have performed in part, and from whose work the employer in fact derived a benefit; and recoveries permitted on a *quantum meruit* for a beneficial performance which was not sufficient to support an action upon the contract, either on the ground of voluntary appropriation, or the benefit the employer must necessarily derive from the work as done.<sup>3</sup>

<sup>1</sup> Kelly v. Bradford, 33 Vt. 35.

<sup>2</sup> Pinches v. Swedish Lutheran Church, 55 Conn. 183.

<sup>3</sup> Veazie v. Bangor, 51 Me. 509; Horn v. Batchelder, 41 N. H. 86; Bertrand v. Byrd, 5 Ark. 651; Jackson v. Jones, 22 id. 158; Newman v. McGregor, 5 Ohio, 349; Goldsmith v. Hand, 26 Ohio St. 101; Gonzales College v. McHugh, 21 Tex. 256; Carroll v. Welch, 26 Tex. 147; Hilliard v. Crabtree, 11 Tex. 264; Houston, etc. Ry. Co. v. Mitchell, 38 Tex. 85; Allen v. McKibbin, 5 Mich. 449;

Clayton v. Blake, 4 Ired. 497; Elliott v. Wilkinson, 8 Yerg. 411; Porter v. Woods, 3 Humph. 56; Harwood v. Tappan, 2 Spear, 536; Williams v. Porter, 51 Mo. 441; Yeats v. Ballentine, 56 id. 530; Estep v. Fenton, 66 Ill. 467; Lighthall v. Caldwell, 56 id. 108; Congregational Society v. Hubble, 62 id. 161; Blakeslee v. Holt, 42 Conn. 226; Ætna Steel Works v. Kossuth Co., 79 Iowa, 40, and earlier cases in that court therein cited; Phelps v. Beebe, 71 Mich. 554; Mehurin v. Stone, 37 Ohio St. 49; Kane

§ 712. **Certificate of architect, engineer, etc.** In important contracts for the erection of buildings and the construction of roads, it is very common to provide for evidence of their due progress and full performance in the certificate of an architect, engineer or other person. When such a certificate [520] is a condition precedent to payment it must be produced, and is the exclusive evidence in an action upon the contract;<sup>1</sup> unless its absence is excused by proof of the architect's sickness, death or refusal to act;<sup>2</sup> and so when made it is conclusive between the parties,<sup>3</sup> if on its production it is not impeached for fraud or mistake,<sup>4</sup> or bad faith.<sup>5</sup> The mistake which will avoid the effect of the certificate must be one which clearly shows that the person who was authorized to make it was misled, deluded or so far misapprehended the facts that he did not exercise his real judgment.<sup>6</sup> If the person for whom the work is done approves it the necessity for a certificate by the individual designated is superseded.<sup>7</sup> And if the contract leaves it optional with the contractor whether there shall be an inspection, or requires it only if he shall so request, he may bring suit without having his work certified.<sup>8</sup>

The measurements or estimates to be conclusive must be made in accordance with the contract. If required to be made for the purpose of periodical payments during the progress of the work, the meaning is that they shall be accurate and final, not mere approximate or conjectural estimates.<sup>9</sup> Where by

v. Stone Co., 39 id. 1; Gove v. Island City M. & M. Co., 16 Ore. 93; Walworth v. Finnegan, 33 Ark. 751.

<sup>1</sup> Smith v. Brady, 17 N. Y. 173; President, etc. v. Pennsylvania Coal Co., 50 id. 250; Smith v. Briggs, 3 Denio, 73; Hennessey v. Farrell, 4 Cush. 267.

<sup>2</sup> Nolan v. Whitney, 88 N. Y. 648.

<sup>3</sup> Walker v. Orange, 16 Gray, 193; McMahon v. New York & E. R. Co., 20 N. Y. 463; Haight v. Vermont C. R. Co., 27 Vt. 700; Koeltz v. Bleckman, 46 Mo. 320; Thomas v. Fleury, 26 N. Y. 26; Merrill v. Gore, 29 Me. 346.

<sup>4</sup> Condon v. South Side R. Co., 14 Gratt. 302; Wyckoff v. Meyers, 44

N. Y. 143; Baltimore & O. R. Co. v. Polly, 14 Gratt. 447; Board of Education v. Shaw, 15 Kan. 33; Haight v. Vermont C. R. Co., 27 Vt. 700; Woodruff v. Hough, 91 U. S. 596. See Bledsoe v. Gonzales Co., 31 Tex. 636.

<sup>5</sup> Mack v. Sloteman, 21 Fed. Rep. 109.

<sup>6</sup> McAuley v. Carter, 22 Ill. 57; Mack v. Sloteman, 21 Fed. Rep. 109; Boston Waterpower Co. v. Gray, 6 Met. 131. See Cook Co. v. Harms, 108 Ill. 151.

<sup>7</sup> Kane v. Stone Co., 39 Ohio St. 1.

<sup>8</sup> Sherman v. Mayor, 1 N. Y. 316.

<sup>9</sup> Haight v. Vermont C. R. Co., 27 Vt. 700.

the terms of a contract for the repair of a building it is stipulated that the articles shall be of the best quality, and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work, or of inferior materials, will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications. The provision for acceptance is an additional safeguard against defects not discernible by an unskilful person.<sup>1</sup> In New York it has been decided that under a contract for the construction of a railroad by which all measurements are to be made and the amount of labor to be determined by [521] the employer's engineer, whose decision is final, the contractor is entitled to notice and an opportunity to be present; and that he is not concluded by measurements made *ex parte*.<sup>2</sup> In Illinois it has been held that notice is not necessary unless the contract requires it.<sup>3</sup> If a certificate is wrongfully refused the contractor is entitled to interest for the time he is deprived of his money.<sup>4</sup>

§ 713. **Liability of employer for stopping work.** Where the contractor's performance is stopped by the fault or direction of the employer, he can recover not only on a *quantum meruit* for what he has done, but also damages for being prevented from completing the work, by bringing his action on the contract.<sup>5</sup> Where payment is due at a specified time after the work is finished the damages include interest from the time the work would have been done if the employer had not

<sup>1</sup> *Glacius v. Black*, 50 N. Y. 145.

<sup>2</sup> *McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

<sup>3</sup> *McAuley v. Carter*, 22 Ill. 53.

<sup>4</sup> *Pawley v. Turnbull*, 3 Giff. 70; *Ranger v. Great Western Ry. Co.*, 3 Ry. Cas. 298, 336.

<sup>5</sup> *Chicago v. Tilley*, 103 U. S. 146; *Black v. Woodrow*, 39 Md. 194; *Wilson v. Bauman*, 80 Ill. 493; *Whitfield v. Zellnar*, 24 Miss. 663; *Orange, etc. R. Co. v. Placide*, 35 Md. 315;

*Myers v. York, etc. R. Co.*, 2 Curt. C. C. 28; *Clark v. Franklin*, 7 Leigh, 1; *Goodrich v. Hubbard*, 51 Mich. 62; *Atkinson v. Morse*, 63 id. 276; *United States v. Behan*, 110 U. S. 338; *Cox v. McLaughlin*, 54 Cal. 605.

As to what constitutes a termination of the contract, see *Palm v. Ohio & M. R. Co.*, 18 Ill. 219; *Cox v. McLaughlin*, 54 Cal. 605; *Moore v. Taylor*, 42 Hun, 45.

interfered.<sup>1</sup> If the action is on a *quantum meruit* the measure of damages will be, according to some authorities, what the work is worth, not necessarily the contract price,<sup>2</sup> though there are well considered adjudications which hold that the recovery cannot exceed the value of the services at such price.<sup>3</sup> In cases where, in the progress of particular work, periodical measurements or inspections are provided for and made for the purpose of partial payments, the sums thus ascertained to be payable are the measure of the compensation to be recovered for the work so measured or inspected, if the employer afterwards breaks the contract by stopping the work, and they have not been made. The contractor in such an event may recover the percentage stipulated to be reserved until the completion of the undertaking, and it becomes immediately payable. When the contract is annulled or repudiated by the employer, and the contractor is prevented from going on to a completion of the work, the amount so reserved becomes part of the arrears of the periodical payments, to which he is as much entitled as if he had been permitted to finish the entire contract. It is released from the conditions under which it was retained by the employer's act, and the contractor is entitled to include it as an amount expressly admitted to be due. He also is concluded by these settlements, and by reason of their being closed as distinct and separate portions of the contract; and he cannot open them again to prove and recover the actual value of the work.<sup>4</sup> [522] But so far as other work has been performed, which remains unadjusted between the parties, the contractor is at large upon his *quantum meruit*, and may prove its actual value.

<sup>1</sup> Bassett v. Sanborn, 9 Cush. 58.

<sup>2</sup> Kearney v. Doyle, 22 Mich. 294; Cox v. Western P. R. Co., 47 Cal. 87; Clark v. Mayor, 4 N. Y. 338; Derby v. Johnson, 21 Vt. 17; United States v. Behan, 110 U. S. 338.

In Marquis v. Laretson, 76 Iowa, 23, it is held that an architect who prepares plans and specifications and agrees to audit and settle accounts and to whom one-third of the contract price for his services is to be paid when the plans, etc., are ready, and

the balance in two equal instalments, may recover the reasonable value of his services, though it is more than one-third of the whole sum, if the building is not completed. *Contra*, Noyes v. Pugin, 2 Wash. St. 653.

<sup>3</sup> Noyes v. Pugin, 2 Wash. St. 653; Doolittle v. McCullough, 12 Ohio St. 360; Western v. Sharp, 14 B. Mon. 177.

<sup>4</sup> Chicago v. Sexton, 115 Ill. 230; Dobbins v. Higgins, 78 id. 440.



Here the rates of compensation stipulated by the contract are no longer binding upon the parties. They constitute but an element in the proof proper to go to the jury as *prima facie* evidence of value, leaving it still open to the parties to show that the average standard of prices agreed on ought to be more or less according to the difficulties and value of this particular portion of the work in comparison with other portions.<sup>1</sup>

Permitting the work to be stopped by an injunction at the suit of a third person,<sup>2</sup> as well as by omission to perform some precedent or concurrent condition, is such a prevention by the employer as gives a right to damages for loss of the profits on that part of the contract which the contractor is thus prevented from executing.<sup>3</sup> The profits which are permitted to be recovered are those which are the direct and immediate fruits of the contract. These are part and parcel of it — entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made and formed, perhaps, the only inducement to it.<sup>4</sup> In an action upon the contract against the employer for preventing complete performance, the contractor is entitled to recover the contract price for the work actually done, and, in the absence [523] of other damages,<sup>5</sup> the difference between that price and what it would cost to perform the contract as to the residue.<sup>6</sup>

<sup>1</sup> Rodemer v. Hazlehurst, 9 Gill, 288.

<sup>2</sup> Doolittle v. Nash, 48 Vt. 441; Whitfield v. Zellnar, 24 Miss. 664.

<sup>3</sup> Grand Rapids, etc. R. Co. v. Van Dusen, 29 Mich. 431; Thorp v. Ross, 4 Keyes, 546; Kugler v. Wiseman, 20 Ohio, 361; Allamon v. Mayor, 43 Barb. 33; Christian County v. Overholt, 18 Ill. 223; Palm v. Ohio & M. R. Co., 18 Ill. 217; Goodrich v. Hubbard, 51 Mich. 62; Atkinson v. Morse, 63 id. 276; McMaster v. State, 108 N. Y. 542; Danolds v. State, 89 id. 36; Sullivan v. McMillan, 26 Fla. 543.

<sup>4</sup> Masterton v. Mayor, 7 Hill, 61; Lawrence v. Wardwell, 6 Barb. 423;

Thompson v. Jackson, 14 B. Mon. 114; Smith v. O'Donnell, 8 Lea, 468; United States v. Behan, 110 U. S. 338; O'Connor v. Smith (Tex.), 19 S. W. Rep. 168.

<sup>5</sup> An action for money paid will lie upon a special contract by which the plaintiffs, at the request of the defendants, detained their laborers and paid them wages while waiting for material which the defendants were to furnish. Chesapeake & O. C. Co. v. Knapp, 9 Pet. 541.

<sup>6</sup> Danforth v. Tennessee & C. R. Co., 93 Ala. 614; Philadelphia, etc. R. Co. v. Howard, 13 How. (U. S.) 307;

The same rule applies where work has not been begun, except that loss of time is not an element of damage.<sup>1</sup> In such a

Heine v. Meyer, 61 N. Y. 171; Jones v. Judd, 4 id. 412; Preble v. Bottom, 27 Vt. 249; Masterton v. Mayor, 7 Hill, 61; New York & H. R. Co. v. Story, 6 Barb. 419; S. C., 6 N. Y. 85; Clark v. Mayor, 4 id. 338; Cunningham v. Dorsey, 6 Cal. 19; Burrell v. New York & S. S. Co., 14 Mich. 34; George v. Cahawba, etc. R. Co., 8 Ala. 234; Morrison v. Galloway, 2 Harr. & J. 461; Friedlander v. Pugh, 43 Miss. 111; Collyer v. Moulton, 9 R. I. 90; United States v. Speed, 8 Wall. 77; Allen v. Thrall, 36 Vt. 711; Derby v. Johnson, 21 Vt. 17; Thorp v. Ross, 4 Keyes, 546; Hale v. Trout, 35 Cal. 229; Morrison v. Lovejoy, 6 Minn. 319; Durkee v. Mott, 8 Barb. 423; Cincinnati, etc. Ry. Co. v. Lutes, 112 Ind. 276; Rayburn v. Comstock, 80 Mich. 448; Woodworth v. McLean, 97 Mo. 325; Hinckley v. Pittsburgh Steel Co., 124 U. S. 264; Glaspie v. Glassow, 28 Minn. 158; Pevey v. Schulenberg & B. L. Co., 33 id. 45; Crescent Manuf. Co. v. Nelson Manuf. Co., 100 Mo. 325; Nilson v. Morse, 52 Wis. 240; Nash v. Hoxie, 59 id. 384; Cameron v. White, 74 id. 425; Boyd v. Meighan, 48 N. J. L. 404; Smith v. O'Donnell, 8 Lea, 468; Porter v. Burkett, 65 Texas, 383; Hambly v. Delaware, etc. R. Co., 21 Fed. Rep. 541; Gibney v. Turner, 52 Ark. 117 (the cost of the work is measured by the market value of the materials on hand for use, the amount that would have been paid for other material and labor, and what the contractor might have gained by saving his time in not completing the contract); Watson v. Gray's Harbor B. Co., 3 Wash. St. 283, quoting the text.

In an action against a railroad company to recover damages on account of their preventing the performance by the plaintiff of a con-

tract for the construction of their roadway, the difference between the amount of the principal contract and of the subcontract entered into by the plaintiff with other persons for the performance of the same work does not constitute the measure of damages. Story v. New York & H. R. Co., 6 N. Y. 85; Masterton v. Mayor, 7 Hill, 61.

The contract price may be recovered if there is no certain mode of ascertaining the damages to be less. Baldwin v. Bennett, 4 Cal. 392; Danley v. Williams, 16 Wis. 581; Sprague v. Morgan, 7 Ala. 952; Manuel v. Campbell, 3 Ark. 324; Ashcraft v. Allen, 4 Ired. 98; Heyn v. Philips, 37 Cal. 529; Lake Shore, etc. Ry. Co. v. Richards, 126 Ill. 448. See Thorp v. Ross, 4 Keyes, 546.

On the breach of a contract to give all the ferrying required by a railroad company at a certain point, if the party bound to perform has kept his contract to keep sufficient boats and appliances to do the work, the profits on all the business diverted from the ferry company constitute the measure of damages. Wiggins Ferry Co. v. Chicago & A. R. Co., 73 Mo. 389.

If a delivery is made of an article manufactured to order, and afterwards the contractor is prevented from performing, he can recover the full value of his labor and materials, although the employer did not use all of the latter. Ellithorpe Air-brake Co. v. Sire, 41 Fed. Rep. 662.

If the article has been manufactured and remains at the factory because the contractee will not receive it, the damages, in the absence of proof of loss of profits, are the cost of storage and insurance. Id.

<sup>1</sup> Singleton v. Wilson, 85 Tenn. 344.

case work performed as a preliminary necessity to the execution of the contract may be recovered for to the extent of its reasonable cost, although there could not have been recovery for it if there had been a performance. If the contractor has derived any benefit from such preparatory work its value must be deducted from the cost thereof.<sup>1</sup> This right of recovery is distinct from the right to recover profits; when these are recovered the former is included.<sup>2</sup> Where the general rule applies and the work entered upon has been stopped by the employer, if the contractor subsequent to his employment makes a contract with a third party for materials necessary to be used in executing the work, and prior to the abandonment of the contract such party has bestowed labor upon them, the contractor may recover for their loss, and the profits which would have been made on them.<sup>3</sup> The right to recover the profits which would have resulted from a full performance is subject to variation where the execution of the contract will require a large number of acts and a series of years. In such a case accidents and contingencies may intervene to vary results; capital, machinery and implements must be supplied and kept. In estimating damages all these matters ought to be considered; and in calculating profits allowance should be made for the labor, skill, supervision and care of the contractor, and his time. It cannot be assumed that he and his machinery and implements will remain idle for years after the contract is terminated. The value of these advantages must be deducted.<sup>4</sup> In some cases the rule which makes it the duty of one who has been prevented from rendering personal service

<sup>1</sup> *Brent v. Parker*, 23 Fla. 200; *Cls. 17*; *Danforth v. Tennessee & Glaspie v. Glassow*, 28 Minn. 158; *C. R. Co.*, 93 Ala. 614.

*United States v. Behan*, 110 U. S. 338; *Mandia v. McMahon*, 17 Ont. App. 34; *O'Connell v. Main, etc. Hotel Co.*, 90 Cal. 515. See *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303.

<sup>2</sup> *United States v. Behan*, 110 U. S. 338.

<sup>3</sup> *Smith v. Flanders*, 129 Mass. 322.

<sup>4</sup> *McMaster v. State*, 108 N. Y. 542. 556; *United States v. Speed*, 8 Wall. 77; *Moore v. United States*, 17 Ct. of

In a recent case the contract was for the erection of a bridge. The right to recover for the profits which would have been made was considered. The court (*Blodgett, J.*) assumed that there should be a reasonable deduction for a release from care, trouble, risk and responsibility attending a full execution of the contract, and deducted thirty per cent. It also refused to allow for the loss of material purchased, there

to obtain other employment is applied to contractors who undertake to produce a stipulated result, and it is held that reasonable diligence must be exercised to that end; the burden of proving that it has or might have been obtained being upon the defendant.<sup>1</sup> The weight of authority, however, is opposed to the application of that rule to contractors,<sup>2</sup> except in cases in which performance of the contract would require an unusual period of time.<sup>3</sup>

**§ 714. Same subject.** Where a party was prevented from completing his contract in proper season by the neglect of the employer to furnish the necessary material, and for that reason was entitled to abandon it, but did not; and afterwards, on being furnished with the material, completed the contract, it was presumed that he proceeded under it; that it therefore furnished the measure of compensation; and he could not recover extra pay by showing that the work was worth more on account of the state of the weather, or because the ground was frozen.<sup>4</sup> If any damages from that cause could be ascertained with the requisite certainty, they were recoverable on account of the employer's breach.<sup>5</sup> The Indiana court assents to the doctrine that a contractor who proceeds without explicit notice or a new agreement to the completion of work specifically contracted for will be presumed to have done so under the special contract; but where the execution of such contract is dependent upon something essential, which is to be performed by the employer, and his default results in damage to the contractor, the former is liable therefor, although the latter may not abandon the contract. While the contract

being no evidence to show that it could not be adapted to other bridges; and also for patterns and expenses in submitting plans and specifications, telegraphing, traveling expenses, *etc.*, incurred in obtaining the contract. *Insley v. Shepard*, 31 Fed. Rep. 869.

<sup>1</sup> *Cincinnati, etc. Ry. Co. v. Lutes*, 112 Ind. 276; *Porter v. Burkett*, 65 Texas, 383.

<sup>2</sup> *Nelson v. Morse*, 52 Wis. 240, 255; *Cameron v. White*, 74 id. 425, 432; *Crescent Manuf. Co. v. Nelson Manuf.*

*Co.*, 100 Mo. 325; *Wolf v. Studebaker*, 65 Pa. St. 459; *Watson v. Gray's Harbor B. Co.*, 28 Pac. Rep. 527; 3 Wash. St. 283. Compare *Savage v. Drs. K. & K. Medical & S. Ass'n*, 59 Mich. 400.

<sup>3</sup> Cases cited in note 4, p. 1626.

<sup>4</sup> *Western U. R. Co. v. Smith*, 75 Ill. 496; *Bush v. Chapman*, 2 Greene (Iowa), 549; *Shaw v. Turnpike*, 3 Pa. 445. Compare the Illinois case with *Tobey v. Price*, 75 Ill. 645.

<sup>5</sup> *Western U. R. Co. v. Smith*, *supra*.



is to be regarded as furnishing the exclusive measure of compensation for the work done, the actual damages which result from the default of the employer should not fall on the contractor. If he in good faith enters upon the performance of the contract and incurs expense, the employer having notice of that fact, and either by an order or negligently failing to perform an essential part devolving upon him suspends the execution of the contract, upon the resumption and completion of the work it will be implied that all loss necessarily occasioned by such suspension shall fall upon him. The contractor may not acquiesce in the suspension and upon the completion of the work claim the contract price and damages for that which may have occurred with his acquiescence. If, however, notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held that the loss must fall upon the contractor in case of a voluntary resumption of the contract.<sup>1</sup> In the case before the court the contractor recovered for damage to tools and interest for the period of delay on all moneys invested in materials which he furnished in pursuance of the contract and in the cost of the labor used in furnishing them. In a New York case<sup>2</sup> it was held that under a [524] right reserved by the employer to make alterations he was not entitled to stop the work. The court approved the action of the referee in allowing more than the contract price for the part done, it appearing that it was worth less than that price to do what remained. But on appeal it was held that under such reservation to make alterations in the form or dimensions of the work the contractor is bound by any alteration made in pursuance of the agreement; that he could recover no more than the contract price for the work done before the alteration, although it was more expensive than the portion dispensed with thereby.<sup>3</sup> Where the subcontractor

<sup>1</sup> Per Mitchell, J., in *Louisville & N. R. Co. v. Hollerbach*, 105 Ind. 137, 144, referring to *Tobey v. Price*, 75 Ill. 645; *Figh v. United States*, 8 Ct. of Cls. 319; *Harvey v. United States*, id. 501; *United States v. Behan*, 110 U. S. 338; *United States v. Speed*, 8

Wall. 77; *Koon v. Greenman*, 7 Wend. 121; *Merrill v. Ithaca, etc. R. Co.*, 16 id. 586; *Railroad Co. v. Howard*, 13 How. 307, 344.

<sup>2</sup> *Clark v. Mayor*, 3 Barb. 288.

<sup>3</sup> S. C., 4 N. Y. 338.

upon a public work was stopped by a law of a general and public character, it was held that no damages could be recovered in respect to the unfinished part; that he was entitled to recover the contract price for the part performed, and that this was not subject to reduction by proof that that part was less expensive than the part which remained to be done when the work was interrupted, although the contract price was uniform for the whole.<sup>1</sup>

<sup>1</sup>Jones v. Judd, 4 N. Y. 412. See Grand Rapids, etc. R. Co. v. Van Dusen, 29 Mich. 431.

In *Rittenhouse v. Mayor*, 25 Md. 336, a contract had been made by the municipal corporation with the plaintiff for the material and mason work for an almshouse. After the buildings had been commenced and some work done an ordinance was passed reciting that the site was unhealthy and unsuitable, and declaring that the public good required the building to be discontinued and the site abandoned, and that another more suitable be selected. It repealed the ordinance under which the contract had been made, and directed the committee having charge of the work to settle with the contractor as far as it could be done on fair and equitable terms. No settlement having been made, the contractor brought suit, and claimed in his bill of particulars: 1. His actual outlays in the preliminary steps for executing the contract. 2. An indemnity against his liabilities to those with whom he had contracted to enable him to fulfill his contract with the city. 3. Damages equivalent to the profits which he would have realized on the contract if he had been permitted to execute it. It was held that the contractor was not entitled to claim any damages on account of profits he might have realized under the contract if he had been permitted to go on with the work. And evi-

dence offered to support the third item was properly rejected, as well as the evidence to support the second item for indemnity against loss on account of subsidiary contracts, the evidence as to the latter being vague, and there being no proof offered of any damage actually incurred. But he was entitled to recover on the first item any damages which he had actually sustained by reason of the contract while the same was operative and in force. There was proof offered that the contractor had been for fifteen years engaged in the manufacture of brick near the city of Baltimore, and that at the date of the contract he had on hand sixty thousand brick of his own manufacture, which were of ready sale in the market, but which he retained in hand in consequence of the contract, and to enable him to supply brick necessary for the work. He was allowed to recover damages in respect to decrease in the market value of the brick before notice for the abandonment of the work.

In *Kugler v. Wiseman*, 20 Ohio, 361, the contractor undertook to do certain work by the 1st of August. After the work had been commenced the employer requested a suspension, which took place. The work was resumed a month later at the employer's request, and upon his promise to pay, over and above the contract price, the additional cost of the work in consequence of any increase in

[525] In ascertaining what it would cost to complete the contract after the employer has stopped the work, with a view to measuring the damages by the difference between such cost and the contract price, it is competent to prove any circumstance which should diminish such cost. Thus, where the work was of such character that it had to be done out of doors, and would hence be retarded and made more expensive by bad weather, it was held competent to show that the season after the employer had stopped the work, and when, otherwise, the contractor would have done it, was pleasant and exceptionally favorable.<sup>1</sup> In Georgia the rule of computing the damages on the basis of profits that the contractor could have made if he had been permitted to finish his contract is not adopted, unless, perhaps, where the case is one which admits of very precise and certain proof of what such profits would be.<sup>2</sup>

the price of wages and materials. The work being finished in January following, suit was brought, not on the contract, but for work and labor. It was held that the contract might be put in evidence by the plaintiff. It was also held that in order to arrive at the increased cost of the work in consequence of an advance in the price of labor and material, it was proper to inquire of a witness generally the difference in the price thereof in the spring and summer and the fall and winter months, although the question was not limited to the particular year in which the work was done. Inquiry may be made as to the difference in the price generally, and then ascertain whether the difference in this particular year varied from others.

<sup>1</sup> Burrell v. New York & S. S. Co., 14 Mich. 34. But see Masterton v. Mayor, 7 Hill, 61.

<sup>2</sup> Vischer v. Railroad Co., 34 Ga. 536. In this case the question was what is the measure of damages against a railroad company for fraudulently hindering a contractor from

completing its road. Walker, J., said: "Much was said as to the proper measure of damages in the case; and it is claimed, especially, that the court erred in ruling out Mr. Hall's testimony, introduced for the purpose of showing the amount of damages complainants sustained, or rather what amount of profits they would have made if they had completed the work according to the stipulations of the alleged contract. The jury having found the facts against the complainants renders it unnecessary to decide what would have been the proper measure of damages in case the finding had been otherwise. Mr. Hall, from a profile of the projected road, makes a calculation of the quantity of work to be done, an approximation rather, and says: 'Under ordinary favorable circumstances some profit should be made on each of the items of work at the price proposed.' He enumerates various circumstances which it would be necessary to include 'in order to estimate accurately the cost;' and adds, 'then, the weather

If the employment of a contractor is to construct articles out of his own materials, and he is prevented by the employer from proceeding in the execution of his contract, he cannot recover under the common count for work and labor done and material furnished or unfinished articles not delivered, the property in which never vested in the employer.<sup>1</sup> [526] [527] The defendant may show in defense that the per-

would greatly affect the result, so that no exact calculation could be made until the job is finished.' 'A good deal would depend on whether the hands would be able to work; much would depend on whether they were well or sick, or run away. If they were sick or ran away most of the time, the contractor would make nothing.' 'Railroad contractors, when experienced, do get frequently mistaken as to underground work, and they sometimes find it for their interest to abandon a contract, and do sometimes abandon them.' The proposition of complainants is to ascertain by this sort of testimony how much money defendant shall pay them. In *Coweta Falls M. Co. v. Rogers*, 19 Ga. 417, this court decides that 'prospective profits which are speculative and conjectural are usually too remote and uncertain to enter into the estimate of damages to be allowed for breach of contract.' In delivering the opinion in this case Lumpkin, J., says: 'We are inclined to think that this whole testimony as to the gains which the plaintiff would have derived from this contract, had he not been prevented from realizing them by the delinquency of the defendant, should have been rejected as too contingent and speculative, and too dependent upon the fluctuation of the markets, the chances of business, and other casualties, to enter into a safe or reasonable estimate of damages. And in lieu thereof a calculation should have been made

of the loss actually sustained by the hire of hands, the interest on the investment, and solid *data* like these, as the *criteria* of loss by the detention of the machinery.' P. 420. We are aware that this case is not, in its facts, like the one at bar, but how much alike in the uncertainty of the evidence by which the amount of damages is to be ascertained. Again, in the *Water Lot Co. v. Van Leonard*, 30 Ga. 560, this court decides: 'That the measure of damages was the interest on the investment for the time the machinery was not employed for want of water,' caused by the failure of the other party to perform his contract; and affirm the case in the 19th Ga. We are aware that some cases hold that the proper measure of damages is the difference between the price to be paid and the actual cost of performing the contract. There may be cases where this may be the correct rule, but the cases already cited show the strong tendency of this court to discard 'speculative profits' and be controlled by 'solid *data*' in estimating the amount of damages to which a party may be entitled for a breach of contract. We do not intend to be understood as laying down a rule for ascertaining the amount of damages a party, for the breach of contract of this kind, would be entitled to. It will be time enough to do so when the case before us shall make it necessary."

<sup>1</sup> *Allen v. Thrall*, 36 Vt. 711.



formance would cost more than the contract price.<sup>1</sup> So the contractor may enhance the damages by showing that expenses have been incurred in preparations for performance.<sup>2</sup> A part performance should be considered with reference to the scope of the entire contract when the employer in his own wrong or in the exercise of a right reserved puts an end to the contract. Thus, the plaintiffs agreed in August to deliver to the defendant as ordered, monthly, throughout a year, logs averaging a certain diameter, he to have the option to determine the contract, and then to pay them the cost of the logs cut and ready for delivery or afloat, and which they have on hand in view of their contract; the defendant terminated the contract in October, the plaintiffs having on hand some logs afloat, and others cut in the woods, but not removed; these were measured and found to be nearly all of less than the specified average diameter; but it was held that in the absence of evidence that they had acted unreasonably or in bad faith, he was liable for the cost of all the logs, and not merely of such as would average of the specified diameter.<sup>3</sup>

### SECTION 3.

#### SALVAGE.

§ 715. **Requisites of salvage service.** A salvage claim is in the nature of a *quantum meruit*; but certain facts must exist to give it validity: First, a marine peril to the property to be rescued; second, voluntary service not owed to the property as a matter of duty; third, success in saving the property, or some portion of it, from the impending peril.<sup>4</sup> These requisites distinguish salvage service from that which

<sup>1</sup> Durkee v. Mott, 8 Barb. 423.

<sup>4</sup> The Connemara, 108 U. S. 352;

<sup>2</sup> Id.; United States v. Speed, 8 Wall. 77; Thompson v. Jackson, 11 B. Mon. 114.

Murphy v. The Suliote, 5 Fed. Rep. 99; The Clarita, 23 Wall. 1.

The recovery of such expenses must not exceed disbursements made necessary by the contract. St. Louis, etc. Ry. Co. v. Beard (Ark.), 19 S. W. Rep. 923.

The peril need not be great. The Leipsic, 5 Fed. Rep. 108. A situation of actual apprehension, though not of real danger, is sufficient. Plymouth Rock, 9 id. 413. A raft of timber is subject to the admiralty jurisdiction on a claim for salvage.

<sup>3</sup> Wolf v. Boston Veneer Box Co., 109 Mass. 68.

Muntz v. A Raft of Timber, 15 id. 555.

is compensated on the *quantum meruit* at common law. Hence, a right to compensation may exist for service in saving a vessel, though it does not constitute a claim for salvage. Thus, where valuable services were rendered upon the employment of the owners, to a vessel in imminent peril, by one having great skill in rescuing wrecked vessels and unusual means adapted to such exigencies, but under circumstances which prevented him from being compensated on the principles of salvage, it was held that he was entitled to recover a very liberal allowance for his services, to be measured as well by the extent of his skill and means as by the time and number of men employed.<sup>1</sup> So compensation for meritorious services in relieving a vessel aground, or otherwise in distress or danger, or even in attempting to do so, may be allowed upon a bill for salvage, although a case for salvage compensation is not made out.<sup>2</sup> The later cases favor the extension of the rule of awarding compensation upon salvage principles so as to include towage when it is rendered to a disabled vessel, not with a view merely to expedite her passage from one place of safety to another, but with the obvious purpose of relief from some circumstances of danger, either present or reasonably to be apprehended. Cases of corporation salvors, at one time held not to be within the rule,<sup>3</sup> are not an exception.<sup>4</sup>

**§ 716. A specific amount may be fixed by agreement.** An agreement for a specific sum dependent upon success does not alter the nature of the service, but only furnishes a rule of compensation. Nor will such an agreement be set aside and a higher rate allowed because it proves to be a hard one for the salvor.<sup>5</sup> And a person hired to assist with [529] knowledge that his employer is operating under such a contract is also limited in the amount of his recovery by the contract price; and the fact that he is uninformed as to the terms of the contract will not subject the property or the

<sup>1</sup> *Sturgis v. Law*, 3 Sandf. 451.

*The J. F. Farlan*, id. 206. See S. C., 8 Blatchf. 207.

<sup>2</sup> *The Sailor's Bride*, 1 Brown's Adm. 68; *The Williams*, id. 208; *The Clarion*, id. 74; *George v. The Arctic*, Bee, 232; *The J. F. Farlan*, 8 Blatchf. 207.

<sup>4</sup> Per Brown, J., in *The Plymouth Rock*, 9 Fed. Rep. 413; *The Camanche*, 8 Wall. 448; *The Birdie*, 7 Blatch. 238.

<sup>3</sup> *The Stratton Audley*, 3 Ben. 241;

<sup>5</sup> *The Silver Spray's Boilers*, 1 Brown, 349.

owners to an additional liability.<sup>1</sup> Contracts made for exorbitant compensation when the property is in peril will be closely scrutinized and not upheld.<sup>2</sup> Where the salvor, however, has not taken advantage of his power to make an unreasonable bargain, courts of admiralty will enforce contracts made for salvage service.<sup>3</sup> To defeat a salvage suit on the ground of a special contract, nothing short of a contract to pay a given sum for the services to be rendered, or a binding agreement to pay at all events, whether successful or unsuccessful in the enterprise, will have that effect.<sup>4</sup> If supervening

<sup>1</sup> *Id.*; *The Marquette*, id. 364.

<sup>2</sup> *The Leipsic*, 5 Fed. Rep. 108; *The C. & C. Brooks*, 17 id. 548; *Scott v. Four Hundred Tons of Coal*, 39 id. 285; *The Tornado*, 109 U. S. 110; *Two Hundred Tons of Coal*, 7 Ben. 343; *The A. D. Patchin*, 1 Blatch. 414; *Williams v. The Jenny Lind*, 1 Newb. 443; *Cowell v. The Brothers, Bee*, 136; *Schultz v. The Nancy*, id. 139. See *Post v. Jones*, 19 How. 150.

<sup>3</sup> *The J. G. Paint*, 1 Ben. 545.

<sup>4</sup> *The Camanche*, 8 Wall. 448. In this case the defense offered was that the services rendered were not salvage services, because, as alleged, they were rendered under an agreement for a fixed sum. *Clifford, J.*, said, referring to it: "Three answers may be given to that proposition, each of which is sufficient to show that it cannot be sustained. (1) No such defense was set up in the answer. (2) Nothing was ever paid or tendered to the libelants for that part of their claim now in controversy, and it is well settled law that an agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment. Such an agreement does not alter the character of the service rendered; so that if it was in fact salvage service, it is none the less so because the compensation to

be received is regulated by the terms of an agreement between the master of the ship or the owners of the salvaged property. *The Emulus*, 1 Sumn. 207. Defenses in salvage suits as well as in other suits in admiralty must be set up in the answer, and if not, and the services proved were salvage services, the libelants must prevail. *The Boston*, 1 Sumn. 328. Agreements of the kind suggested ought certainly to be set up in the answer, as it is not every agreement which will have the effect to diminish a claim for salvage compensation. On the contrary, the rule is that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage. *The Versailles*, 1 Curt. 353; *The Lushington*, 7 Notes of Cases, 361; *The Centurion*, 2 Ware, 490; *The Foster*, Abb. Adm. 222; *The Whitaker*, 1 Sprague, 282; *The Brig Susan*, id. 503; *Parsons on Shipping*, 275; *The Phantom*, L. R. 1 Adm. & Ecc. 58; *The White Star*, id. 68; *The Saratoga*, 1 Lush. 321; *MacLachlin on Shipping*, 531; *Coffin v. The John Shaw*, 1 Cliff. 230. (3) But if the agreement had been set up in the answer, it would constitute no de-

circumstances make the performance of a salvage contract impossible and the vessel in distress is saved from peril by a different service from that contracted for — as where she is towed to C. instead of to G., as the contract provided — the court may award compensation as though no agreement therefor had been made.<sup>1</sup>

Parties may agree on the amount of salvage compen- [530] sation or on the principles on which it shall be adjusted, and such agreements, if fairly made, and no advantage be taken of ignorance or distress, are readily upheld by the courts.<sup>2</sup> In such cases the vessel-owners will be bound for the sum named without any deduction in respect of the salvage of the cargo.<sup>3</sup>

**§ 717. Nature of peril, and duty of claimant.** The vessel must be in imminent peril, though it is not necessary that but for the service for which salvage is claimed it would have been lost.<sup>4</sup> The peril may be from shipwreck, fire, pirates or enemies;<sup>5</sup> but it must not originate in the negligence or fault of the salvors.<sup>6</sup> They cannot force themselves upon a vessel in distress against the will of the master;<sup>7</sup> nor claim against the cargo if the owner is accessible, when there is an attempt between the claimant and the master to throw the whole expense upon the cargo;<sup>8</sup> nor found a claim for salvage

fense, as by the terms of the instrument the libelants were not to receive any compensation whatever, or be entitled to any lien upon the property, unless the materials and machinery were substantially saved, so that it is clear that the compensation was not to be paid at all events." See *Bowley v. Goddard*, 1 Low. 154.

<sup>1</sup> *The Westbourne*, 14 Prob. Div. 132.

<sup>2</sup> *The Prinz Heinrich*, 13 Prob. Div. 31; *Harley v. Four Hundred Sixty-seven Bars of R. Iron*, 1 Sawyer, 1; *The Independence*, 2 Curt. 357; *The Emulus*, 1 Sumn. 207; *Bearse v. Pigs of Copper*, 1 Story, 314; *The True Blue*, 2 W. Rob. 176; *The Henry*, 2 Eng. L. & Eq. 564. See *Gould v. United States*, 1 Ct. of Cls. 183; *Bondies v. Sherwood*, 22 How. 214.

<sup>3</sup> *The Prinz Heinrich*, 13 Prob. Div. 31.

<sup>4</sup> *The Connemara*, 108 U. S. 352; *The Delphos*, 1 Newb. 412; *The Charles*, id. 329; *Talbot v. Seeman*, 1 Cranch, 1, 43.

<sup>5</sup> *Id.*; *Lee v. The Alexander*, 2 Paine, 466; *Davison v. Sealskins*, id. 324.

<sup>6</sup> *The Clarita and The Clara*, 23 Wall. 1; *The Copella*, L. R. 1 Adm. & Ecc. 356; *The Queen*, 2 id. 53; *The Samuel H. Crawford*, 6 Fed. Rep. 906.

<sup>7</sup> *New Harbor Protection Co. v. The Charles P. Chouteau*, 5 Fed. Rep. 463; *The Cleone*, 6 id. 517; *The Susan*, 1 Sprague, 503. See *Anna Leland*, 1 Low. 310.

<sup>8</sup> *The C. M. Titus*, 11 Fed. Rep. 442.



upon acts which are in themselves tortious or unlawful.<sup>1</sup> Seamen belonging to the ship in peril cannot, as a general rule, claim salvage compensation; not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo get into a position of danger in order that by extreme exertion they might claim such compensation.<sup>2</sup> Pilots also are excluded from such compensation for any exertions or services rendered while acting within the line of their duty;<sup>3</sup> but they may become salvors like other persons if they perform extraordinary services outside of the line of their duty.<sup>4</sup> So may

<sup>1</sup> Talbot v. Seeman, 1 Cranch, 1; Davidson v. Sealskins, 2 Paine, 324.

<sup>2</sup> The Clarita and The Clara, 23 Wall. 1; Miller v. Kelly, Abb. Adm. 564; Hobart v. Droган, 10 Pet. 108; Studley v. Baker, 2 Low. 205; Coffin v. Brig Akbar, 5 Fed. Rep. 456.

<sup>3</sup> Studley v. Baker, 2 Low. 205; Hope v. The Dido, 2 Paine, 243.

<sup>4</sup> Bean v. The Grace Brown, 2 Hughes, 112; Montgomery v. The T. P. Leathers, 1 Newb. 421; The Wave v. Hyer, 2 Paine, 131.

The pilot act of Oregon (S. L. 1868, p. 23) provides that the steam tugs and pilot boats at the mouth of the Columbia river shall tow and pilot vessels upon the pilot grounds between Astoria and the open sea outside of the bar, "in all weather" when the bar "can be crossed by first-class steamers and sail vessels," for a uniform compensation, in proportion to the draft of the vessel, called pilot fees. Under this act it has been held that so long as it is reasonably safe to take a vessel in tow, anywhere on the pilot grounds, the tug is bound to do so, and is not entitled to compensation therefor as a salvor; but that she is not bound to incur extraordinary risk to tow a vessel or to rescue it from danger of wreck; and when she does so, she is entitled to compensation therefor as

a salvor. Roff v. Wass, 2 Sawyer, 389. In Hobart v. Droган, 10 Pet. 108, Judge Story said: "A pilot, as such, is not disabled in virtue of his office from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. . . . Extraordinary events may occur in which (the seamen's) connection with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which case they may be permitted to claim as salvors. Such was the case of the seamen left on board in the case of The Blaireau, 2 Cranch, 268; and such was the exception alluded to in the case of The Neptune, 1 Hagg. Adm. 237. In this last case Lord Stowell, after saying that the crew of a ship cannot be considered as salvors, gave what he deemed a definition of a salvor. 'What (said he) is a salvor? A person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer, without

the crew of an imperiled vessel after they are discharged from their duty and allegiance as such;<sup>1</sup> and passengers if they perform extraordinary services.<sup>2</sup> All persons who give [532] any personal assistance in saving the property are salvors; and the ship, cargo, freight, etc., saved make one fund on the subject of salvage.<sup>3</sup>

§ 718. **Property must be saved.** Salvors, strictly so called, are persons who undertake to save property in peril at the request of the owner or the master; they are under his direction and control and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation if their lien is not endangered.<sup>4</sup> Risk of life is not a necessary element of salvage service; where such risk, however, is incurred in saving property it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation. But the controlling inquiry in salvage is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors?<sup>5</sup> Unless it is saved in fact by those who claim as salvors, salvage will not be allowed, however good their intentions and heroic and perilous their exertions.<sup>6</sup> Thus, if by accident or the negligence of the salvors a rescued ship is led into peril as great as that from which she has been

any pre-existing contract that connects him with the duty of employing himself for the preservation of the ship.' And it must be admitted that however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy and strikes at the root of those temptations, which might otherwise exist, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate." *Delong v. Perago, Bee*, 212; *Hand v. The Elvira, Gilp.* 60; *Le Tegre*, 3 Wash. 567.

<sup>1</sup> *The Connemara*, 108 U. S. 352; *The Olive Branch*, 1 Low. 286; *The Antelope*, id. 130; *The Triumph*, 1

*Sprague*, 428; *The Blaireau*, 2 Cranch, 240; *Hobart v. Drogan*, 10 Pet. 108.

<sup>2</sup> *The Connemara*, 108 U. S. 352; *The Two Friends*, 1 W. Rob. 286; *The Brunston*, 2 Hagg. Adm. 3, note. See *Bond v. The Cora*, 2 Wash. 80.

<sup>3</sup> *The Cargo ex Ulysses*, 13 Prob. Div. 205 (seamen on government vessel); *The Ottawa*, 1 Low. 274.

<sup>4</sup> *The Ida L. Howard*, 1 Low. 2.

<sup>5</sup> *The Charles Avery*, 1 Bond, 119; *Blagg v. The Bicknell*, id. 270.

<sup>6</sup> *Montgomery v. The T. P. Leathers*, 1 Newb. 421; *The John Wurts*, Olcott, 462; *Clarke v. The Dodge Healey*, 4 Wash. 651; *Andrew v. The Edam*, 13 Fed. Rep. 135; *The Alghitha*, 17 id. 551; *The Avoca*, 39 id. 567.

delivered, all claim to salvage is lost.<sup>1</sup> Where three vessels, at different times, rendered valuable services to a vessel in continuous peril, it was held that each was entitled to salvage, although the separate services of neither alone would have saved her.<sup>2</sup> Those who begin a salvage service and are in the successful prosecution of it are entitled to be regarded as the meritorious salvors of whatever is preserved though wrongfully interrupted in the work by others who complete the service.<sup>3</sup>

**§ 719. Amount recoverable as salvage.** The amount of salvage to be allowed is in the discretion of the court; there is no precise rule, nor is it in its nature reducible to rule, for [533] it must in every case depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, and so forth, all of which must be estimated and weighed.<sup>4</sup> In an early case in this country in which the foregoing observations were made, Johnson, J., said: "As far as our inquiries extend, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum; below that it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than half may have been awarded; but they will be found to be cases of very extraordinary merit or on articles of very small amount."<sup>5</sup> The more material considerations entertained by courts in determining the amount of compensation are thus stated, as the result of the admiralty decisions in England and America, by the British board of trade in instructions given in 1865 to the receivers of wrecks in Great Britain: The degree of danger from

<sup>1</sup> The Duke of Manchester, 6 Moore's P. C. 91; The Yan Yean, 8 Prob. Div. 147; The Cheerful, 11 id. 3; The Benlarig, 14 id. 3.

<sup>2</sup> Muntz v. A Raft of Timber, 15 Fed. Rep. 555; The Island City, 1 Black, 121.

<sup>3</sup> The John Gilpin, Olcott, 77.

<sup>4</sup> The Adventure, 8 Cranch, 231; The Connemara, 108 U. S. 352; The Hesper, 18 Fed. Rep. 692; S. C., id. 696. The award will be reduced, if in making it there was a clear mistake, violations of just principles or

a departure from authority. The Bay of Naples, 48 Fed. Rep. 737.

<sup>5</sup> The Adventure, *supra*; Bearse v. Pigs of Copper, 1 Story, 314; Bond v. The Cora, 2 Wash. 80; British Consul v. Smith, Bee, 178. See McGinnis v. The Pontiac, 5 McLean, 359; Cross v. The Ballona, Bee, 193; The Dos Hermanos, 10 Wheat. 306; Smith v. The Stewart, Crabbe, 218; Hobart v. Drogan, 10 Pet. 108; Peisch v. Ware, 4 Cranch, 347; Tyson v. Pryor, 1 Gall. 133; The John Wurts, Olcott, 462.

which lives or property are rescued; the value of the property saved; the risk incurred by the salvors; the value of the property employed by them in the enterprise, and the danger to which it was exposed; the skill shown in rendering service; the time and labor occupied. These considerations have been often acted upon, and there has been added to them another: The degree of the success achieved and the proportions of the value of the property lost and saved.<sup>1</sup> The more important factors are the value of the property saved, that being the subject-matter in respect of which the action arises; the perils from which the vessel has been rescued; the value of the rescuing vessel. The last consideration affects the amount of the reward only in so far as it exposes the owner of the salving ship to risk of loss.<sup>2</sup> A distinction is made between the compensation of salvors who volunteer and those who go in answer to a request. In the former case there can be no recovery unless there is success; in the latter a recovery may be had in any event, and it will be more nearly approximated to the value of the services rendered.<sup>3</sup> In respect to vessels engaged in the business of salvage, where there are no circumstances of unusual danger and no exceptional activity, the reward will not be out of all proportion to what would have been accepted upon a contract contingent upon success.<sup>4</sup> In one case this rule has been applied to a vessel not thus engaged.<sup>5</sup> Although by the general maritime law, aside from the English statutes, the saving of human life, disassociated from the saving of property, is not a subject of salvage compensation, yet, when connected with the rescue of property, it is uniformly held to enhance the meritorious character of the service and the consequent remuneration.<sup>6</sup> If salvors have sustained serious pecuniary loss in saving a vessel of

<sup>1</sup> *The Sandringham*, 10 Fed. Rep. 556, 573; *The Annie Henderson*, 15 id. 550; *The Egypt*, 17 id. 359; *The Queen of the Pacific*, 25 id. 610.

<sup>2</sup> *The Werra*, 12 Prob. Div. 52.

<sup>3</sup> *Wilmington Transportation Co. v. The Old Kensington*, 39 Fed. Rep. 496; *The Undaunted*, 1 Lush. 90, quoted from on this point in *The Sabine*, 101 U. S. 384, 390.

<sup>4</sup> *The Birdie*, 7 Blatch. 243; *The H. B. Foster*, 1 Abb. Adm. 235; *Ehrman v. Swiftsure*, 4 Fed. Rep. 463.

<sup>5</sup> *The Mary E. Long*, 7 Fed. Rep. 364.

<sup>6</sup> *The Aid*, 1 Hagg. 84; *The Queen Mab*, 3 id. 242; *The Emblem*, Davis. 121; *The Plymouth Rock*, 9 Fed. Rep. 413.



ample value to defray it, in addition to a proper sum for the master and crew, and also to leave a substantial surplus to the owner, the remuneration should include a sum sufficient to reward the risk and labor, and cover damages and expenses resulting from the performance of the services, and evidence of these should be received.<sup>1</sup> The principle which controls is adequate compensation for the service rendered, in view of the difficulties attending it and the results achieved, bearing in mind the policy of encouraging efforts to rescue imperiled lives and property.<sup>2</sup> The value of the property saved is always regarded, but its importance as a factor in determining the amount of the allowance is less than it was formerly. Increasing consideration is given to the perils encountered.<sup>3</sup> If the salving vessel reaches her destination in time to fulfill her contracts and sail on her appointed day, her detention will not be considered important.<sup>4</sup> In estimating the value of the property saved, it is said in a recent case, where the service rendered enabled the vessel to complete her voyage and earn the entire freight agreed upon, that the weight of authority has settled the rule to be that the freight to be considered is only such proportion as the distance at which the service was performed bore from the point of departure to the whole voyage.<sup>5</sup>

Where a vessel was wrecked on Charleston bar, and her cargo of cotton cast ashore on the islands, and there secured by great labor and risk of life and health on the part of the salvors, the court noticed the fact that while employed in this service, and in securing and drying the cargo on shore, their

<sup>1</sup> *The City of Chester*, 9 Prob. Div. 182; *The Sunnyside*, 8 id. 137.

<sup>2</sup> *The Plymouth Rock*, 9 Fed. Rep. 413; *The John Gilpin*, *Olcott*, 77; *The Egypt*, 17 Fed. Rep. 359; *The Mary E. Dana*, id. 353.

<sup>3</sup> *Id.* See *Hand v. The Elvira*, 1 Gilp. 607; *Murphy v. The Suliote*, 5 Fed. Rep. 99; *The Hyderabad*, 11 id. 749; *Anderson v. The Edam*, 13 id. 135; *The Cyclone*, 16 id. 486; *Baker Salvage Co. v. The Excelsior*, 19 id. 436; *The Rio Grande*, 22 id. 914; *The Latrador*, 39 id. 503; *The Neto*, 15 id.

819. In the last case *Locke, J.*, gives the circumstances connected with several unreported cases in the southern district of Florida, and the amount awarded in each. See, also, *Bond v. The Cora*, 2 Wash. 80; *The Saragossa*, 1 Ben. 553; *The Lancaster*, 8 Prob. Div. 65; *The Marie Anne*, 48 Fed. Rep. 742; *The Kaaterskill*, id. 701.

<sup>4</sup> *The Werra*, 12 Prob. Div. 52.

<sup>5</sup> *The Sandringham*, 10 Fed. Rep. 556, 576; *The Norma*, *Lush*, 124.

growing crops suffered from neglect.<sup>1</sup> The whole net proceeds may be awarded under special circumstances; as [534] where the amount is small, and the owner of the property refuses to appear;<sup>2</sup> and counsel fees are sometimes considered by the court in estimating the amount to be awarded in salvage.<sup>3</sup> Where money is the thing saved, a fifth or a tenth, according to the circumstances, has been the ancient proportion.<sup>4</sup>

In awarding salvage upon a foreign vessel, courts in this country, it is said, will regard the rate of allowance in the courts of the owner's country.<sup>5</sup> But it is ruled in a recent case where the salvaged and salvaging vessel belonged to different foreign countries that their rights and liabilities were deter-

<sup>1</sup> *Stephens v. The Argus*, Bee, 170; *Bond v. The Cora*, 2 Wash. 80.

In *The Attacapas*, 3 Ware, 65, Ware, J., said: "The general principle which governs courts of admiralty in awarding salvage is to give a liberal reward, not merely a compensation *pro opere et labore*, but such a reward as will be an inducement to men accustomed to the dangers of the sea to adventure on these perilous enterprises, by which not only property but often lives are saved. For saving life, at whatever risk, the courts can give no reward, for there is no common measure between life and money; but the merit of saving property may be measured by a pecuniary compensation. Another reason for liberality is to make the compensation such as will in some measure guaranty the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection; and farther, to insure the good faith of salvors, embezzlement is always visited with the entire forfeiture of salvage. . . . But, if I do not misjudge, there is another consideration belonging to this case that ought not

to be overlooked. This vessel was rescued from the perilous shores of Cape Cod, a coast as much dreaded by mariners as the *infames scopulos Acroceraunia* of antiquity. For the interests of humanity, as well as those of commerce, it is certainly desirable that the inhabitants of such a coast should understand that if they will hazard their lives in relieving vessels in distress they will not be dismissed with a parsimonious reward, such as will the next time put them to a calculation of the relative value of a gallant and hazardous salvage and the plunderings of a wreck."

If special losses or injuries are sustained by some of the men engaged in the service, the court, in distributing the award, will allow compensation therefor. *The Cyclone*, 16 Fed. Rep. 486.

<sup>2</sup> *The Lahaina*, 19 Fed. Rep. 923; *The Zealand*, 1 Low. 1; *Llewellyn v. Two Anchors and Chains*, 1 Ben. 80.

<sup>3</sup> *The Liverpool Packet*, 2 Sprague, 37.

<sup>4</sup> *Taylor v. The Friendship*, Bee, 175.

<sup>5</sup> *The Waterloo*, Blatchf. & H. 114.

minable by the principles of the general maritime law, and the court declined to follow the code of the country to which one vessel belonged and the practice in the courts of that of which the other carried the flag.<sup>1</sup> The rates of salvage compensation at sea cannot properly be adopted for such service on rivers.<sup>2</sup> No distinction is made between vessel and cargo in awarding such compensation on the ground that less exertion is necessary to save the cargo. The service is considered single and to be compensated by a *quantum* of the proceeds of the whole property saved.<sup>3</sup> So where there are several sets [535] of salvors who take part in the service, as in stripping and unloading a stranded vessel, they do not have separate liens on the several articles saved by each, but all are entitled to be paid out of the property saved.<sup>4</sup> It is as much the duty of salvors to care for property which has been rescued as to save it, so long as it is in their custody or control; and service of this nature is not to be separated from the other and paid for independently.<sup>5</sup>

§ 720. **Derelict property.** The amount of salvage to be allowed in derelict cases is governed by the same principles that apply in other salvage cases, and is fixed in the discretion of the court according to the circumstances of each case; that is according to the danger to the property, its value, the risk to life, the skill and labor bestowed, and the duration of the service.<sup>6</sup> And the amount so estimated has generally varied from two-fifths to one-half of the value of the property saved.<sup>7</sup>

<sup>1</sup> The Edam, 13 Fed. Rep. 135. 372; Hindry v. The Priscilla, Bee, 1; Values will be ascertained by the rules prevailing in the port of the forum. The Marie Anne, 48 id. 742. Bell v. The Ann, 2 Pet. Adm. 278; The Elizabeth and Jane, 1 Ware, 33; The Boston, 1 Sumn. 328; The

<sup>2</sup> McGinnis v. The Pontiac, 1 Newb. 130. Charles Henry and Cargo, 1 Ben. 8; The Henry Ewbank, 1 Sumn. 400;

<sup>3</sup> Montgomery v. The T. P. Leathers, 1 Newb. 421; The Ottawa, 1 Low. 274. Taylor v. The Cato, 1 Pet. Adm. 48; The John Wurts, Olcott, 462; The Georgiana, 1 Low. 91; The Cayenne,

<sup>4</sup> The Albion Lincoln, 2 Low. 71.

<sup>5</sup> The Dolcoath, 16 Fed. Rep. 264.

<sup>6</sup> Post v. Jones, 19 How. 150; The Georgiana, 1 Low. 91; The Eleanor, 48 Fed. Rep. 842. In exceptional cases much greater proportions have been allowed. Cargo

<sup>7</sup> Barrels of Oil, 1 Sprague, 91; Sprague v. Barrels of Flour, 2 Story, Fed. Rep. 508. 195; The John E. Clayton, 4 Blatch.

from Wreck of Bark Edwards, 12 Fed. Rep. 508.

“The tendency is, where the service rendered is prompt and gallant, to make liberal awards, in many instances exceeding more than half of the net value of the property saved.”<sup>1</sup>

Two reasons are recognized for allowing a liberal reward in cases of derelict property: first, that the property having been abandoned or lost, it is not for its owner to complain of the reward paid to strangers who restore it; second, protection of the public against danger from the derelict property. Where a brig was abandoned in near proximity to the entrance to a great seaport, and in the track of vessels of every description inward and outward bound, so that, by being left floating, with some sails still up, and with no one on board to set her lights, to keep her on her course, or to answer or give hails, the court denominated her a dangerous thing; and that, for taking in charge and saving a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation of any vessel from any voyage in order to supply the wreck with a crew, and to make her presence safe.<sup>2</sup> The fact that a derelict vessel might have been saved without the interposition of the salvors may be taken into account in the determination of the compensation, but cannot deprive them of all claim.<sup>3</sup>

§ 721. **Forfeiture of compensation.** It is a general [536] rule of admiralty to deny compensation to salvors, no matter how meritorious their services may have been, if they are guilty of misconduct or bad faith. And where there is such forfeiture, the shares forfeited do not accrue to co-salvors, to increase theirs, but are reserved for the owners of the property saved.<sup>4</sup> Embezzlement of any part of the property works a forfeiture.<sup>5</sup> So will neglect to inform the salvor beforehand of an imminent and secret danger, known to the salvor, and against which he was able to warn her. But he may be entitled to compensation for services performed, although his conduct has been such as to forfeit a salvage remuneration.<sup>6</sup> Where the captain and owners had concealed a part of the

<sup>1</sup> The Flower City, 16 Fed. Rep. 866, per Coxe, J.

<sup>2</sup> The Anna, 6 Ben. 166.

<sup>3</sup> Holmes v. The Joseph C. Griggs and Cargo, 1 Ben. 81.

<sup>4</sup> The Rising Sun, 1 Ware, 385. See McGregor v. Ball, 4 La. Ann. 289.

<sup>5</sup> Id.

<sup>6</sup> American Ins. Co. v. Johnson, Blatchf. & H. 9.



goods saved, their share of the salvage was declared forfeited to the owner of the vessel saved.<sup>1</sup> And if persons interfere unnecessarily with wrecked property which is being saved under a contract with the owners, such meddlers cannot claim as salvors, although they bring it into port.<sup>2</sup> The making of false representations for the purpose of exaggerating the danger and hardship of the service to enhance the reward, spoliation, smuggling, obtrusion of unnecessary service, or refusal to accept proffered or needful assistance, will be punished by total or partial forfeiture of compensation.<sup>3</sup>

<sup>1</sup> *Flinn v. The Leander*, 1 Bee, 260;      <sup>2</sup> *A Quantity of Iron*, 2 Sprague, 51; *Mason v. The Blaireau*, 2 Cranch,      *Hand v. The Elvira*, Gilp. 60.  
239; *The Boston*, 1 Sumn. 328.      <sup>3</sup> *Harley v. Gawley*, 2 Sawyer, 7, 11.

## CHAPTER XVII.

## SURETYSHIP.

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## SECTION 1.

## CREDITOR AGAINST SURETY.

[537] § 722. **The contract of suretyship.** As the contract of a surety is to answer for the debt, default or miscarriage of another, either by joining in the undertaking of the principal, or by a collateral obligation, the amount recoverable by the creditor or promisee against the surety is a primary inquiry; then arises the consequent right of the surety, who has been compelled to pay, against his principal for reimbursement; and his right against co-sureties, if any, for contribution.

§ 723. **Measure of surety's liability.** Against a surety the damages recoverable are the amount of the debt which he has undertaken to pay, or the loss he has consented to be answerable for and interest, if the debt bears it, or if interest is chargeable on the principles by which it is imposed as damages for default in payment. When a surety enters into the contract with the principal, undertaking with him to perform it, the consideration received by the latter supports it as to both;<sup>1</sup> and the agreement of the surety cannot extend further than that of the principal.<sup>2</sup> And then, as well as when the surety afterwards assumes the same obligation upon a new consideration, he is bound to the like measure of responsibility; that is, the same rule of damages necessarily applies to both. In respect to the other party to the contract, they are equally principals in extent of liability.<sup>3</sup>

A surety undertakes for another; the debt or damages

<sup>1</sup> *Savage v. Fox*, 60 N. H. 17; *Dillingham v. Jenkins*, 7 Sm. & M. 479. *Castner v. Slater*, 59 Me. 212; *Monk v. Beal*, 2 Allen, 585; *Eastin v. Board of School Directors*, 40 La. Ann. 705;

<sup>2</sup> *Ellis v. Bibb*, 2 Stew. 63.

<sup>3</sup> *McIntosh v. Likens*, 25 Iowa, 555; *St. Paul Foundry Co. v. Weymann, Kirby v. Studebaker*, 15 Ind. 45; 40 Minn. 419.

sought to be recovered result from the act or omission [538] of that other; the surety is only under obligation to pay or make compensation by his contract; his liability thus originates, and has no greater scope or extent than that contract properly interpreted provides for. Hence, not unfrequently, the amount recoverable from him will be materially affected by the construction which it receives.

**§ 724. Interpretation of surety's contract.** A surety's contract is to be interpreted like other contracts. In guaranties, letters of credit, and other obligations of sureties the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances, and to forward the purposes for which it is made.<sup>1</sup> In many early cases in England and in this country it was held that such contracts should be construed strictly.<sup>2</sup> In *Russell v. Clark* <sup>3</sup> *Marshall, C. J.*, said: "The law will subject a man having no interest in the transaction to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume." But in other, and especially the later, cases a more liberal rule is laid down. In *Mason v. Pritchard* <sup>4</sup> the king's bench declared that the words of the guarantor were to be taken as strongly against the party giving the guaranty as the sense of them would admit of. In *Hargreave v. Smee* <sup>5</sup> *Tindal, C. J.*, [539] said: "The question is what is the fair import to be collected from the language used in this guaranty. The words

<sup>1</sup> *Belloni v. Freeborn*, 63 N. Y. 383; *Mellville v. Hayden*, 3 B. & Ald. 593; *Locke v. McVean*, 33 Mich. 473; *Cremer v. Higginson*, 1 Mason, 323; *Gates v. McKee*, 13 N. Y. 232; *Lee v. White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Mauran v. Bullus*, 16 Pet. 528.  
<sup>2</sup> 7 Cranch, 69, 90.  
<sup>3</sup> 12 East, 227.  
<sup>4</sup> 6 Bing. 244.  
<sup>5</sup> *Bailey v. Larchar*, 5 R. I. Me. 358; *Boehne v. Murphy*, 46 Mo. 57; *Brown v. Haven*, 37 Vt. 439.

<sup>2</sup> *Nicholson v. Paget*, 1 Cr. & M. 48;



employed are the words of the defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the court puts on any other instrument. With regard to other instruments the rule is that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." In *Douglass v. Reynolds*<sup>1</sup> Story, J., after quoting in part the foregoing extract from the opinion of Chief Justice Marshall in *Russell v. Clark*, said: "On the other hand, as these instruments (commercial guaranties) are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in *Drummond v. Prestman*<sup>2</sup> as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit.<sup>3</sup> And the same rule was adopted in the king's bench in *Mason v. Pritchard*."<sup>4</sup> In *Lee v. Dick*<sup>5</sup> Thompson, J., said a guaranty is a commercial instrument and ought to be construed according to what is fairly to be presumed to have been the understanding of the parties without any strict technical nicety.<sup>6</sup> As to commercial guaranties the language of Mr. Justice Story in *Lawrence v. McCalmont*<sup>7</sup> has frequently been quoted with approbation,<sup>8</sup> and probably expresses the rule of construction now generally accepted. He said: "We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed and the purpose to which it is applied. We should never forget that letters of guaranty are [540] commercial instruments, generally drawn by merchants

<sup>1</sup> 7 Pet. 113.<sup>2</sup> 12 Wheat. 515.<sup>3</sup> Fell on Guaranty, ch. 5, p. 129.<sup>4</sup> 12 East, 227.<sup>5</sup> 10 Pet. 482.<sup>6</sup> *Mayer v. Isaac*, 6 M. & W. 605.<sup>7</sup> 2 How. 426.<sup>8</sup> *Gates v. McKee*, 13 N. Y. 232; *Davis v. Wells*, 104 U. S. 159; *Lafargue v. Harrison*, 70 Cal. 380; *Fischler v. Hofheimer*, 73 Va. 35; *Tootle v. Elgutter*, 14 Neb. 158.

in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business commerce throughout the world. . . . Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words by which another party is misled to his injury." When the language used is not ambiguous or loose its natural meaning will be given it,<sup>1</sup> although it results in giving the obligation a retroactive effect.<sup>2</sup>

A question which frequently arises on such instruments is whether the guaranty is a continuing one, or whether it is exhausted by the first transaction under it. The language of guaranties is so various and the accompanying circumstances so dissimilar that each case must depend largely on its own facts. The conflict that is manifest between some cases that very nearly resemble each other plainly results from the application in one instance of a liberal rule of interpretation in resolving doubts in respect to the intention of the parties, and in another a strict rule, by resolving the doubt in one case against the guarantor and in the other in his favor.<sup>3</sup> One

<sup>1</sup> *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 494.

<sup>2</sup> *People v. Lee*, 104 N. Y. 441.

Such effect cannot be given when the liability assumed is expressed to be for any default which "should" occur. *Brooks v. Baker*, 9 Daly, 398.

<sup>3</sup> Compare *Grant v. Ridsdale*, 2 Har. & J. 186; *Rapelye v. Bailey*, 5 Conn. 149; *Bent v. Hartshorn*, 1 Met. 24; *Drummond v. Prestman*, 12 Wheat. 515; *Boyce v. Ewart*, 1 Rice, 126; *Bastow v. Bennett*, 3 Camp. 220; *Merle v. Wells*, 2 id. 413; *Nicholson v. Paget*, 1 Cr. & M. 48; *Lee v. Dick*, 10 Pet. 482; *White v. Reed*, 15 Conn.

457; *Whitney v. Groot*, 24 Wend. 82; *Fellows v. Prentiss*, 3 Denio, 512; *Douglass v. Reynolds*, 7 Pet. 113; *Mayer v. Isaac*, 6 M. & W. 605; *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smee*, 6 Bing. 244; *Melville v. Hayden*, 3 B. & Ald. 593; *Evans v. Whyle*, 5 Bing. 485; *Glyn v. Hertel*, 8 Taunt. 208; *Cremer v. Higginson*, 1 Mason, 323; *Gates v. McKee*, 13 N. Y. 232; *Bell v. Bruen*, 1 How. 169; *Haigh v. Brooks*, 10 Ad. & El. 309; *Martin v. Wright*, 6 Q. B. 917; *Hitchcock v. Humphry*, 5 M. & G. 560; *Allan v. Kenning*, 9 Bing. 618; *Clark v. Burdett*, 2 Hall. 197; *Crist v. Burlingame*,

general rule for determining whether such obligations are continuing is that, if the amount of liability is limited and the time is not, it is presumed to have been the intention of the parties that the instrument should not be limited in its scope to a single transaction.<sup>1</sup> In ascertaining such intention the facts and circumstances attending the execution of the contract may be considered, and great weight is sometimes given them.<sup>2</sup> In some cases the rule is said to be that unless the words used fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked.<sup>3</sup>

[541] § 725. **Contract not to be extended by construction.** The obligation of a surety or guarantor is confined to his contract. In this sense it is construed strictly. He is not liable on an implied engagement where a party contracting for his own interest might be, and has a right to insist upon the exact performance of any condition stipulated for whether others would consider it material or not.<sup>4</sup> "Nothing can be clearer," says Story, J.,<sup>5</sup> "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances

62 Barb. 351; *Boehne v. Murphy*, 46 Mo. 57; *Bailey v. Larchar*, 5 R. I. 530; *Adams v. Clark*, *Brayton*, 196; *Washington Bank v. Shurtleff*, 4 Met. 30; *Williamson v. Chiles*, 5 Ired. 244; *Lloyds v. Harper*, 16 Ch. Div. 290; *Tobler v. Willis*, 59 Texas, 80; *Morgan v. Boyer*, 39 Ohio St. 324; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385; *Whipple v. Mississippi & Y. Packet Co.*, 34 Fed. Rep. 54; *Kernochan v. Murray*, 111 N. Y. 306; *S. C.*, 53 Hun, 50; *Perryman v. McCall*, 66 Ala. 402; *Platter v. Green*, 26 Kan. 252; *Young v. Brown*, 53 Wis. 333.

<sup>1</sup> *Mathews v. Phelps*, 61 Mich. 327; *Gard v. Stevens*, 12 id. 265; *Kimball Co. v. Baker*, 62 Wis. 526; *Seller v. Jones*, 16 M. & W. 112; *Mason v. Pritchard*, 12 East, 227; *Parker v. Wise*, 6 Maule & S. 239; *Hitchcock*

*v. Humfrey*, 6 Scott N. R. 540; *Tootle v. Elgutter*, 14 Neb. 158.

<sup>2</sup> *Mathews v. Phelps*, 61 Mich. 327; *Allen v. Savings Bank*, 4 Mo. App. 66; *Gardner v. Watson*, 76 Texas, 25; *Rindge v. Judson*, 24 N. Y. 64, 70; *Gates v. McKee*, 13 id. 232; *Dobbin v. Bradley*, 17 Wend. 422; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273; *Rutherford v. Brachman*, 40 Ohio St. 604.

<sup>3</sup> *Wright v. Griffith*, 121 Ind. 478; *Tischler v. Hofheimer*, 83 Va. 35.

<sup>4</sup> *Gates v. McKee*, 13 N. Y. 232; *Chatham v. McCrea*, 12 Up. Can. C. P. 352; *People v. Chalmers*, 60 N. Y. 158; *Kingsbury v. Westfall*, 61 id. 356; *Evansville Nat. Bank v. Kaufmann*, 93 id. 273.

<sup>5</sup> *Miller v. Stewart*, 9 Wheat. 680; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Mann v. Brown*, 71 Tex. 241.

pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand on the very terms of his contract; and if he does not assent to any variation of it and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases . . . where persons have been bound for the good conduct of clerks of merchants and others illustrates this position. The whole series of them, from *Lord Arlington v. Merricke*<sup>1</sup> down to *Pearsall v. Summersett*,<sup>2</sup> proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners by name it has constantly been held that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas*,<sup>3</sup> in which a more extensive construction is supposed to have been given, confirms the general rule; for that turned upon the circumstance that the security was given to the house as a banking house, and thence an intention was in-

<sup>1</sup> 2 Saund. 412.

<sup>2</sup> 4 Taunt. 593.

<sup>3</sup> 1 T. R. 291, note. This case has been doubted. *Dance v. Girdler*, 1 New Rep. 42. In *Weston v. Barton*, 4 Taunt. 673, Lord Mansfield, after stating the general rule, said: "This, then, being the construction of the instrument from almost all the cases, in truth, we may say from all (for though there is one adverse case of *Barclay v. Lucas*), the propriety of that decision has been very much questioned."

In *Burch v. De Rivera*, 53 Hun, 367, the guaranty was of the credit of "the house of De Rivera & Co." This was held to mean only the firm or partnership, and it did not continue after a change in the individuals composing it.

There are some American cases which are not harmonizable with the

general principles of law concerning the rights of sureties. Thus it has been ruled that the sureties on the bond of a general agent are presumed to know when they become such that the business would naturally, if not necessarily, involve the employment by him of sub-agents, and the former are therefore liable for moneys received by the latter (*Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310; *Hayden v. Hill*, 52 Vt. 259), or by a partner of the obligor. *Palmer v. Bagg*, 64 Barb. 641. It is believed that these adjudications are not sustained by the current of authority. *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Parham Sewing M. Co. v. Brock*, 113 Mass. 197; *London Assurance Co. v. Bold*, 6 Q. B. 523; *Bellairs v. Ellsworth*, 3 Camp. 52; *White Sewing M. Co. v. Hines*, 61 Mich. 423.



ferred that the parties intended to cover all losses, notwithstanding a change of partners in the house."

The obligation is not to be extended to any other subject, [542] person or period of time than is expressed or necessarily included in it.<sup>1</sup> Where debt was brought on a bond for the faithful performance of official duty by a deputy collector of direct taxes in eight townships, and the instrument of appointment was referred to in the bond, it was held that the alteration of the instrument so as to include another township, without the consent of the sureties, discharged them from responsibility for moneys subsequently collected by the principal.<sup>2</sup> So where J., being desirous of purchasing goods

<sup>1</sup> *Burge on Suretyship*, ch. 3, p. 40; *Mercer Co. v. Coovert*, 6 W. & S. 70; *Grant v. Smith*, 46 N. Y. 93; *Wayman v. Hoag*, 14 Barb. 232; *Holland v. Teed*, 7 Hare, 50; *McGovney v. State*, 20 Ohio, 93; *Bill v. Barker*, 16 Gray, 62; *Backhouse v. Hall*, 6 B. & S. 507; *State v. Boon*, 44 Mo. 254; *Simson v. Cooke*, 8 Moore, 588; *Fisher v. Cutter*, 20 Mo. 206; *Dunlop v. Gordon*, 10 La. Ann. 243; *State v. Medary*, 17 Ohio, 554; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Glyn v. Hertel*, 8 Taunt. 208; *Supervisors v. Kaime*, 39 Wis. 468; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Dover v. Twombly*, 42 N. H. 59; *Vivian v. Otis*, 24 Wis. 518; *Leeds v. Dunn*, 10 N. Y. 469; *Beckhead v. George*, 8 Hill, 635; *McCluskey v. Cromwell*, 11 N. Y. 593; *Connecticut, etc. Ins. Co. v. Bowler*, 1 Holmes, 263; *United States v. Cheeseman*, 3 Sawyer, 424; *Kelly v. Kellogg*, 79 Ill. 477; *Dunlap v. Wilson S. M. Co.*, 81 Ill. 496; *Cutler v. Ballou*, 136 Mass. 337; *Boston & S. Glass Co. v. Moore*, 119 id. 435; *Harney v. Laurie*, 13 Ill. App. 400; *Bowers v. Cobb*, 31 Fed. Rep. 678; *Cornell v. Eagan*, 13 Daly, 505; *Post v. Losey*, 111 Ind. 74; *John Hancock Mut. L. Ins. Co. v. Lowenberg*, 120 N. Y. 44; *Brennan v. Clark*, 29 Neb. 385, 399; *Patterson v. Gage*, 11 Colo. 50; *Bensinger v. Wren*, 100 Pa. St. 500; *Abrahams v. Jones*, 20 Ill. App. 83; *Dill v. Lawrence*, 109 Ind. 564; *Newton v. Devlin*, 134 Mass. 490; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273; *Markland, etc. Co. v. Kimmel*, 87 Ind. 560; *Kimball Co. v. Baker*, 62 Wis. 526; *Graeter v. De Wolf*, 112 Ind. 1. See *Richards v. Storer*, 114 Mass. 101; *Andre v. Fitzhugh*, 18 Mich. 93; *Saunders v. Stevens*, 116 Mass. 133; *Leonard v. Speidel*, 104 Mass. 356; *Tucker v. White*, 5 Allen, 322.

As to the effect upon sureties of the extension of the existence of a corporation to which they are bound, see *Thompson v. Young*, 2 Ohio, 334; *Union Bank v. Ridgely*, 1 H. & G. 324; *Bank of Washington v. Barrington*, 2 Pa. 27; *Brown v. Lattimore*, 17 Cal. 93; *Exeter Bank v. Rogers*, 7 N. H. 21; *National Bank of Poughkeepsie v. Phelps*, 97 N. Y. 44; *People v. Backus*, 117 id. 196; *National Exchange Bank v. Gay*, 57 Conn. 224.

<sup>2</sup> *Miller v. Stewart*, 9 Wheat. 680; *Lafayette v. James*, 92 Ind. 240 (additional duties imposed upon obligor by ordinance); *Northwestern Nat. Bank v. Keen*, 14 Phila. 7 (book-keeper in bank promoted to teller and assistant cashier); *People v. Pennock*, 60 N. Y. 426 (money not re-

of the plaintiff on credit, procured a letter of guaranty from the defendant to the plaintiff, by which the defendant promised to be surety for the amount of goods, to be paid January 1, 1840, and the plaintiff sold the goods to J., and took his note, payable December 25, 1839, it was held that the defendant was not bound, although the plaintiff did not require payment from J. until after January 1, 1840.<sup>1</sup> A guaranty that the earnings of a schooner shall pay a certain dividend for two years does not extend beyond the time of the guarantee's ownership of her.<sup>2</sup> Sureties on bonds given to employers to secure the fidelity, honesty, care and diligence of employees do not insure the former against the destruction of his property or money, while in the latter's custody or control, by inevitable accident or against spoliation by thieves or robbers, when the employee is free from fraud or negligence.<sup>3</sup>

**§ 726. Illustrations of the rule.** A written guaranty "of the payment of all powder" consigned to a certain person for sale will not cover a sale to the consignee of powder remaining unsold upon closing the account between the consignor and himself; and it cannot be controlled by evidence of a custom known to the guarantor among commission merchants to purchase goods remaining unsold under such circumstances, and

ceived by principal in his official capacity); *First Nat. Bank of Baltimore v. Gerke*, 68 Md. 449 (assistant book-keeper promoted to note teller and discount clerk).

In order that sureties shall be discharged from liability by the imposition of new, distinct and separable duties upon their principal from those covered by their guaranty, such duties must render impossible or materially hinder or impede the performance of those guaranteed. "Where the new employment is separate and distinct, and in no respect essentially interferes with the duty covered by the bond, the imposition of such added duty is wholly a matter between the employer and servant with which the sureties have no concern," although

such employment may increase the temptation and opportunity for a breach of the bond. *Mayor v. Kelly*, 98 N. Y. 467; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226. See *Home Savings Bank v. Trabue*, 75 Mo. 199; *National Mech. Banking Ass'n v. Conkling*, 90 N. Y. 116. As to the release of sureties on the bonds of public officers, see § 485, *ante*.

<sup>1</sup> *Walrath v. Thompson*, 2 N. Y. 185; S. C., 6 Hill. 540; 4 id. 200; *Dixon v. Spencer*, 59 Md. 246.

<sup>2</sup> *Bishop v. Alcott*, 86 N. Y. 503.

<sup>3</sup> *Chicago, etc. R. Co. v. Bartlett*, 20 Ill. App. 96; *Baltimore & O. R. v. Jackson*, 3 Atl. Rep. 100 (Pa.); *Walker v. British Guarantee Ass'n*, 18 Q. B. 277; S. C., 83 E. C. L. 276.

to treat such a transaction as a sale to a third person.<sup>1</sup> It was remarked by the court that the defendant might have been [543] willing to guaranty the fidelity of the factor to account for actual sales of goods consigned, with the right to return those unsold, and yet have been unwilling to assume the responsibility of absolute purchases by him, to be retained whether he could sell them or not.

One who has become guarantor for such notes of a specified description as another should give in pursuance of a written contract cannot by virtue thereof be held liable for notes differing materially from those which the contract provided for. Thus, where the contract, the performance of which is guaranteed, provides for notes at four months without interest, to be renewed, if desired, for sixty days at eight per cent., the guarantor is not holden for notes running six months, with interest for four months at seven per cent. and thereafter at eight per cent.; nor for six-month notes with interest at eight per cent. after four months; the variance is a substantial one.<sup>2</sup> A guaranty to make good to a specified amount any deficit in the payment of certain subscriptions to capital stock does not mean that the subscriptions had been made, or that they would be paid in full. It was based upon the assumption that they had been made and were valid.<sup>3</sup>

The sureties upon an assignee's bond given pursuant to the statute in reference to voluntary assignments for the benefit of creditors are not liable for the failure of their principal to account for the assets in his hands as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and the avails thereof in his hands to be applied in satisfaction of their claims.<sup>4</sup> Where the surety's contract embraced the payment

<sup>1</sup> *Carkin v. Savory*, 14 Gray, 528; *Mo. App.* 371. See *Farmers' & Mech. Weed Sewing M. Co. v. Winchel*, 107

*Ind.* 260 (sureties not liable for sales made to an agent under their contract guarantying his fidelity as such); *Burlington Ins. Co. v. Johnson*, 120 Ill. 622. See *Wilson v. Edwards*, 6 Lans. 134.

<sup>2</sup> *Locke v. McVean*, 33 Mich. 473.

<sup>3</sup> *Sedalia, etc. Ry. Co. v. Smith*, 27

*Nat. Bank v. Lang*, 87 N. Y. 209.

<sup>4</sup> *People v. Chalmers*, 60 N. Y. 154.

Under a statute which defined the duty of an assignee to be to take possession of the insolvent's estate, to sue and recover all of it and the debts due, etc., and to convert the same into money, his sureties are not liable for his conversion of the property of

of laborers employed by the principal or his agent, it did not extend to laborers employed by his subcontractor.<sup>1</sup> A bond for the faithful discharge of duty by a life insurance agent was conditioned that he should "receive and forward applications for, and deliver policies, and receive and forward premiums upon the same, within the city of D." He received the premiums of certain parties who had been insured in D. by a former agent of the company, but who had since removed therefrom; and it was held that the failure to pay over to the company such moneys was not a breach of the bond subjecting the sureties to liability.<sup>2</sup> The defendant guarantied payment to the plaintiff to the extent of 50% for gold he might supply to E., a working goldsmith, for the purpose of carrying [544] on his business. The plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money, deducting from the gold the usual charge for credit for the length of time the bills had to run, and from the money interest at the same rate. E. did not indorse the bills, and the gold was applied by him to the purposes of his business. The bills were dishonored and suit was brought on the guaranty; it was held that the gold so advanced was not supplied within the meaning of the guaranty.<sup>3</sup>

Where a surety signed a note with his principal payable to a bank ten days after date it was held that the surety was not liable on it for moneys advanced by the bank after the note was due; it was not a continuing security.<sup>4</sup> But where the makers of a note, signed by them for the accommodation of others, payable to a bank on demand, deliver it to the accommodated party, it is an inference of law, in the absence of further authority or restriction, that the latter may put it to any use of which it is capable, and may pledge it for future loans as a continuing guaranty until the sureties terminate their responsibility by notice.<sup>5</sup> In such a case the principals delivered the note to the payee bank with a written memo-

another person to the use of the See *Fond du Lac Harrow Co. v. Bowles*, 54 Wis. 425.

<sup>1</sup> *McCluskey v. Cromwell*, 11 N. Y. 593; *State v. Hinsdale-Doyle Granite Co.*, 117 Ind. 476; *Faurote v. State*, 110 id. 463.

<sup>3</sup> *Evans v. Whyle*, 5 Bing. 485.

<sup>4</sup> *Bank of St. Albans v. Smith*, 30 Vt. 148.

<sup>5</sup> *Agawam Bank v. Straver*, 18 N.

<sup>2</sup> *Crapo v. Brown*, 40 Iowa, 487. Y. 502.



random therein that it was left as collateral security for all liability incurred by them, and evidence was held admissible for the purpose of arriving at the intent of the parties in the hypothecation, that they were at the time under no liability to the bank; that in view of that fact they intended the note should be security for future advances, and that the words "*all liability*" in the memorandum imported a continuing guaranty.<sup>1</sup> "There was no contract," said Mr. Justice Selden, "even in form, by the makers of the note, with any party except the bank; and that contract was made, not when the note was signed, but when it was delivered to the bank. Of course, then, the terms agreed upon, when the deposit was made, were terms agreed upon between the bank and the makers of the note, provided the agent did not exceed his authority; and as [545] the note acquired its validity at that time, and by virtue of those terms, the whole arrangement is, upon well-settled principles, to be taken together as constituting but a single contract. Consequently, the absolute terms of the note are to be regarded as modified by the conditions of the simultaneous agreement to hold it merely as collateral to the loans to be made upon the faith of it. Although payable on demand, no suit could be maintained upon it until the debt for which it was held as security had become due; and no more could be recovered than the amount of such debt."

§ 727. **Further illustrations.** In a contract with the war department to build a fort, it was agreed that advances should be made in part payment of the work for materials delivered with the invoice at the fort and pronounced by the engineer to be of proper quality, and at the end of each month for the work performed. After large advances had been made, the contract was assigned and the assignee gave bond, with sureties, to account for the advances made under and by virtue of the contract. It was held that the sureties were entitled to the benefit of all limitations provided in the contract, and were not answerable for advances made when such limitations were dispensed with, whether they were made before or after the making of the bond, it not appearing that the sureties knew they had been made.<sup>2</sup> It is apparent from the illustrations

<sup>1</sup> Id. See *Weed v. Clark*, 4 Sandf. 31.

<sup>2</sup> *United States v. Tillotson*, 1 Paine, 305.

which have been given, and many others that might be cited, that the plaintiff must bring his case very strictly within the undertaking of the surety, and cannot recover beyond it. Thus the plaintiff and S. entered into a contract that S. should perform certain work at a fixed sum, receiving from time to time payment for three-fourths of the work done; the remaining one-fourth to be paid a month after the completion of the whole; if S. should fail to complete the works plaintiff was to employ others and deduct the expenses from the sum payable to him. The defendant was surety for the performance of this contract by S., who abandoned it when partly performed. The plaintiff, at the request of S., had advanced him a sum which exceeded the whole cost of the work then accom- [546] plished, but was less than the contract price. The plaintiff then had the works completed at a cost which, added to the price of that actually done, was less than the contract price, but, added to the money which he had advanced, was more than that sum. He sued the defendant on his guaranty, and it was held that he was only entitled to nominal damages, as the loss had arisen from his own act in advancing more money than he ought to have done, not from the refusal of S. to go on with the works.<sup>1</sup>

A surety who guaranties the punctual payment of the interest on a money bond which has six years and a half to run, and on which interest is payable semi-annually, can only be made liable for such interest as accrues before the bond becomes due.<sup>2</sup> In such a case Church, C. J., said: "The claim against the defendant is based upon the guaranty, which is in the following words: 'For value received, I guaranty the punctual payment of the interest on the within bond, and will

<sup>1</sup> Warne v. Calvert, 7 Ad. & E. 143; otherwise than in pursuance of a legal obligation. Newton v. Devlin, Wood's Mayne on Damages, 417. 134 Mass. 490.

The sureties on a bond for the completion of a public work which reserves to the contractee the right to complete it upon a breach by the contractor are liable for the increased expense incurred in completing it and for damages done to the property of third persons in prosecuting the work; but not for payments made

<sup>2</sup> Hamilton v. Van Rensselaer, 43 N. Y. 244.

A guaranty of the payment of an interest-bearing obligation includes the interest so long as the debt remains unpaid. Hurd v. Callahan, 9 Abb. New Cas. 374. See French v. Bates, 149 Mass. 73.

pay the interest on demand in default of its payment by W.' The question is whether the defendant as guarantor is liable for anything beyond the interest up to the time when the principal became due according to the terms of the bond. This must depend upon the construction of the language of the instrument, viewed in the light of circumstances existing at the time it was made. In ascertaining the meaning of the language used, the same rules of construction are applicable to contracts of suretyship as to other contracts. When the true signification of the contract is thus ascertained, the surety or guarantor has a right to insist that his liability shall not be extended beyond its precise terms.<sup>1</sup> What, then, is the true meaning of this contract? W. agreed to pay the principal in six years and a half, and, in the meantime, to pay semi-annual interest on specific days. The defendant is presumed to have seen and understood the exact agreement of W., and to have executed the guaranty in contemplation of its performance by him. He has a right to limit his liability, and he did limit [547] it. He did not guaranty the payment of the principal, but only the 'punctual payment of the interest on the within bond.' What interest? Clearly, the interest payable according to the terms of the bond, and that only. No other interest was specified or alluded to, and none other was contemplated by the defendant, as he contracted, we must presume, with reference to the payment of the principal when due by W. He neither agreed to pay the principal, nor to be liable for the consequences of its non-payment. . . . The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that, by strict legal rules, interest, as such, cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract."<sup>2</sup>

<sup>1</sup> Gates v. McKee, 13 N. Y. 232, and to the same effect. There is a remarkable discrepancy between Hamilton v. Van Rensselaer, in the su-

<sup>2</sup> Melick v. Knox, 44 N. Y. 676, is

Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the whole period of actual occupancy was brought against both, it was held that the other lessee was not estopped to show that he signed the lease in the character of a surety for the term specified, without having in fact occupied the premises at any time; and further, that he was not liable for the rent after the time mentioned in the writing, the holding over being as to him no continuance of the lease.<sup>1</sup> But where the premises are leased for a certain time with the privilege to the tenant to continue in possession for another succeeding term, and he avails himself of the privilege, the guaranty of a third person for the payment of the rent is a continuing guaranty during the possession of the tenant for such [548] extended term.<sup>2</sup> The cases are very numerous on the point that the responsibility of a surety is confined strictly to his undertaking. Those cited below may be found worth consulting by the curious reader who desires to pursue the subject.<sup>3</sup> Where the case is brought within the surety's contract

preme court, as reported in 28 How. Pr. 192, and 43 Barb. 117, and in the court of appeals, in 43 N. Y. 244. In the former the facts and the law are thus stated: A surety who guaranties the punctual payment of the interest on a money bond, *and there is no stipulation for interest in the bond*, can only be made liable for such interest as accrues by way of damages after the bond becomes due.

<sup>1</sup> Kennebec Bank v. Turner, 2 Me. 42.

<sup>2</sup> Dufau v. Wright, 25 Wend. 636; Decker v. Gaylord, 8 Hun, 110; Kaigh v. Fuller, 14 N. J. Eq. 419; Deblois v. Earl, 7 R. I. 26.

<sup>3</sup> Taylor v. Wetmore, 10 Ohio, 490; Blecker v. Hyde, 3 McLean, 279; Barns v. Burrow, 67 N. Y. 39; Sollee v. Mengy, 1 Bailey, 620; Michigan State Bank v. Peck, 28 Vt. 200; Bus-sier v. Chew, 5 Phila. 70; Allison v. Rutledge, 5 Yerg. 193; Johnson v. Brown, 51 Ga. 498; Stevenson v. Mc-

Lean, 11 Up. Can. C. P. 208; Penoyer v. Watson, 16 Johns. 100; Walsh v. Bailie, 10 id. 180; Parham Sewing M. Co. v. Brock, 113 Mass. 194; Smith v. Montgomery, 3 Tex. 199; Montefiore v. Lloyd, 15 C. B. (N. S.) 203; 33 L. J. (C. P.) 49; London Ass. Co. v. Bold, 6 Q. B. 514; Bill v. Barker, 16 Gray, 62; Manhattan Gas Light Co. v. Ely, 39 Barb. 174; Hollond v. Teed, 7 Hare, 50; Spiers v. Houston, 4 Bligh (N. S.), 515; Wright v. Russell, 2 W. Bl. 934; Mackay v. Dodge, 5 Ala. 388; Grant v. Smith, 46 N. Y. 93; Barnett v. Smith, 17 Ill. 565; Sterns v. Marks, 35 Barb. 565; Simson v. Cooke, 8 Moore, 588; Wadsworth v. Allen, 8 Gratt. 174; Palmer v. Bagg, 56 N. Y. 523; Dry v. Davy, 10 Ad. & El. 30; Union Bank v. Costen, 3 N. Y. 203; Hood v. Mathis, 21 Mo. 308; Reed v. Fish, 59 Me. 358; Boehne v. Murphy, 46 Mo. 57; Dick v. Crowder, 10 Sm. & M. 71; Dobbin v. Bradley, 17 Wend. 422; Tucker v. White, 5 Allen, 322;



he is only liable for such actual damages as the plaintiff shows.<sup>1</sup> A defendant's covenant that the debts of a certain firm, into which the plaintiff was about to enter as a partner, did not exceed a certain sum; and that if they did the defendant would pay on demand of the plaintiff the amount by which they exceeded that sum, was held not to be a covenant for liquidated damages, but a contract to indemnify the plaintiff as to any loss he might suffer from an erroneous statement of the debts; it was for the jury to consider to what extent his position had been altered by reason of the defendant's breach of covenant.<sup>2</sup>

**§ 728. Guaranties.** A guaranty imports a contract collateral to the contract debt or obligation of another, except where the word is used in the sense of warranty.<sup>3</sup> This collateral contract may embrace part only of the debt or obligation of the principal,<sup>4</sup> or the whole of it; and the damages for its breach will depend upon its nature and extent. If it be a full guaranty of payment or performance owing by the principal, then the guarantor, when in default, must respond by the same measure and standard as the principal.<sup>5</sup>

*Richards v. Storer*, 114 Mass. 101;  
*Sanderson v. Stevens*, 116 id. 133;  
*Clark v. Sawyer*, 121 id. 224; *Simon-*  
*son v. Grant*, 36 Minn. 439.

<sup>1</sup> *King v. Norman*, 4 C. B. 884.

<sup>2</sup> *Walker v. Broadhurst*, 3 Exch. 589. See *Mauran v. Bullus*, 16 Pet. 528.

<sup>3</sup> The fact that a contract is entered into by a guarantor jointly with his principal does not prevent it from being a guaranty if its terms disclose that the latter is separately bound by an original independent contract to which that given as security is collateral, if the latter is conditioned for the performance of the principal's prior engagement. The principal's obligation is original with the obligee; the other is cumulative. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Ward v. Wilson*, 100 id. 52; *Singer Manuf. Co. v. Litter*, 56 Iowa, 601.

<sup>4</sup> *Skinner v. Valentine*, 59 N. Y. 473; *Melick v. Knox*, 44 id. 676; *Hamilton v. Van Rensselaer*, 43 id. 244.

<sup>5</sup> *Oakley v. Boorman*, 21 Wend. 588; *Gage v. Lewis*, 68 Ill. 604; *Smith v. Rogers*, 14 Ind. 224; *Furnas v. Durgin*, 119 Mass. 500; *Fletcher v. Derrickson*, 3 Bosw. 181; *Skinner v. Valentine*, 59 N. Y. 473; *Douglass v. Howland*, 24 Wend. 35; *Gammell v. Paramore*, 58 Ga. 54; *Tuton v. Thayer*, 47 How. Pr. 180; *Gutta Percha, etc. Co. v. Benedict*, 37 N. Y. Super. Ct. 430; *Upham v. Prince*, 12 Mass. 14; *Cooper v. Page*, 24 Me. 73; *More v. Howland*, 4 Denio, 264; *Carew v. Denney*, 8 Pick. 363; *Blanchard v. Wood*, 26 Me. 358; *Gist v. Drakely*, 2 Gill, 330; *Cobb v. Little*, 2 Me. 261; *Carter v. McGehee*, Phill. (N. C.) L. 431; *Beau v. Arnold*, 16 Me. 251; *Campbell v. Butler*, 14 Johns. 349; *Allen v. Brightmire*, 20

A guarantor may make himself liable for the principal debt although the demand may not be binding on the debtor.<sup>1</sup>

A continuing guaranty may be determined by notice from the security, where it is in the nature of a continuing offer, and only binding as far as acted upon,<sup>2</sup> unless the consideration is given once for all, when the obligation cannot be terminated by the guarantor and does not end with his death.<sup>3</sup> Where performance of a contract is guarantied the surety may, after default by his principal which would justify the other party in terminating it, require that it be terminated, and the claim against himself confined to damages then recoverable.<sup>4</sup> A guarantor of payment is, like his prin- [550]

id. 365; *James v. Long*, 68 N. C. 218; *Ellmaker v. Franklin Ins. Co.*, 5 Pa. St. 183; *Remsen v. Graves*, 41 N. Y. 471; *Hendricks v. Banning*, 7 Minn. 32; *Samson v. Thornton*, 3 Met. 275; *Tenny v. Prince*, 4 Pick. 385; *Josselyn v. Ames*, 3 Mass. 274; *Ulen v. Kittridge*, 7 id. 233; *White v. Howland*, 9 id. 314; *Moeis v. Bird*, 11 id. 436; *Nelson v. Dubois*, 13 Johns. 175; *Harrick v. Carman*, 12 id. 159; *Hunt v. Adams*, 5 Mass. 358; *Sumner v. Gay*, 4 Pick. 311; *Baker v. Briggs*, 8 Pick. 122.

<sup>1</sup> *Mason v. Nichols*, 22 Wis. 360. *McLaughlin v. McGovern*, 34 Barb. 208; *Veasey v. Willis*, 6 Gray, 90.

<sup>2</sup> *Offord v. Davies*, 12 C. B. (N. S.) 748; *Jordan v. Dobbins*, 122 Mass. 168. See *Brandt on Surety & G.* (2d ed.), §§ 134, 135.

“Where a guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guarantied without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the

transactions guarantied are closed, of his liability thereunder.” *Davis Sewing M. Co. v. Mills*, 55 Iowa, 543. If as the result of the neglect to give notice the guarantor suffers loss, he is relieved to that extent. *Singer Manuf. Co. v. Littler*, 56 Iowa, 601.

<sup>3</sup> *Lloyds v. Harper*, 16 Ch. Div. 290.

<sup>4</sup> *Hunt v. Roberts*, 45 N. Y. 691. In this case the defendant guarantied the performance on the part of C. of a building contract made by C. with the plaintiffs, wherein the plaintiffs agreed to perform the work by the 15th of October, and C. to furnish materials and pay a certain sum. After October 15th, the work being unfinished, the defendant gave notice to the plaintiffs that if they did not complete the work before the 1st of November he would not be responsible as guarantor thereafter. The plaintiffs kept on until June following, being delayed by C.’s failure to supply materials. The defendant, by an arrangement with a third person, and to which the plaintiffs were not a party, had assumed C.’s obligations, and after November 1st urged the plaintiffs to perform and himself supplied the material, but stated to them that he would not be personally responsi-

principal, liable to interest from the time the money became due;<sup>1</sup> and for attorney fees when stipulated for in the contract.<sup>2</sup> A guaranty upon a note of its payment after maturity or any time thereafter with interest "and all costs and expenses paid or incurred in collecting the same including attorneys' fees" embraces only the costs and expenses of an action against its maker; not those incurred in an action upon the guaranty. The whole liability under such a contract must be exhausted in one action; the guarantor cannot be sued for the debt and afterwards for the costs and expenses.<sup>3</sup> Where the agreement guarantied provides for stipulated damages in case of the principal's default, the guarantor is liable by his

ble. It was held, in an action on the contract of guaranty, that the effect of the notice was an extension of time for performance, and continued the defendant's liability, as guarantor, to November 1st only; and his liability was limited to the debt and damages which the plaintiffs were entitled to claim at that time. See *Estate of De Silver*, 9 Phila. 302; *Pleasanton's Appeal*, 75 Pa. St. 344.

While it is the duty of the obligee to give notice to the guarantors of their defaulting principal's conduct, except in cases governed by the commercial law, the failure to do so is matter of defense, and does not work a discharge unless damages result to them. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Ward v. Wilson*, 100 id. 52; *Davis v. Wells*, 104 U. S. 159; *Pittsburgh, etc. R. Co. v. Shaeffer*, 59 Pa. St. 350; *Grocers' Bank v. Kingman*, 16 Gray, 473; *Peel v. Tatlock*, 1 B. & P. 419; *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310.

A surety bound for the fidelity and honesty of his principal and for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may terminate his liability in either of two cases: first, where the guarantied contract has

no definite time to run; and second, where it has such time, but the principal has so violated it, and is so in default that the obligee may lawfully terminate it on account of the breach. *Emery v. Baltz*, 94 N. Y. 408; *Burgess v. Love*, L. R. 13 Eq. 450; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Exch. 73.

The weight of authority denies the right of a guarantor to revoke a continuing contract for the faithful discharge of duty without cause. *Gordon v. Calvert*, 2 Sim. 253; S. C., 4 Russ. 581; *Williams v. Reynolds*, 11 La. 230. The Indiana court sees no reason why such a right should not be exercised; but it must be done reasonably and upon notice to all concerned. An employer, unless misconduct creating a probable emergency is shown to exist, is not bound to subject his affairs to embarrassment by immediately discharging an employee. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332.

<sup>1</sup> *Gammel v. Paramore*, 58 Ga. 54; *Gutta Percha, etc. Co. v. Benedict*, 37 N. Y. Super. Ct. 430.

<sup>2</sup> *First Nat. Bank v. Breese*, 39 Iowa, 640.

<sup>3</sup> *Abbott v. Brown*, 131 Ill. 108.

guaranty for those damages.<sup>1</sup> A guarantor of payment is not liable for the costs of an unsuccessful action against the principal debtor where the creditor is not bound to resort to legal proceedings against him before he can have recourse against the party secondarily liable;<sup>2</sup> but it is otherwise where the guaranty is of collection and payment.<sup>3</sup> If proceedings are taken against the debtor and something realized from him the amount to be credited in the guarantor's favor is the net sum realized. He has no equity which requires that the gross amount shall be applied to the satisfaction of the debt.<sup>4</sup>

§ 729. **Measure of liability.** In case of a guaranty of the amount due on a note, and not of its collectibility, the damages are what the plaintiff has lost by the breach; and this loss is the value of a judgment against the maker, if one had been obtained; and if it appears that the maker was solvent and prevented a recovery of judgment by proving payment, the measure of damages is the amount which purports to be due on the note.<sup>5</sup> A guaranty against any loss which might occur by reason of a sale of goods, which, by stipulation between the principal parties, are to be sold within ninety days, will not render the guarantor liable if, by their agreement, the goods are not sold within that time and the time for the sale is fixed at a subsequent date.<sup>6</sup> But where the guaranty was of the payment of any purchase of bagging and rope between its date and a stated date in the future, it was held to extend to purchases upon a reasonable credit made between those dates, although the time of payment was not to arrive until after that day.<sup>7</sup>

A contract was made for furnishing a steam-engine, and a surety in behalf of the manufacturers guarantied its performance, and in case of breach to refund all sums of money the other party might pay or advance with interest. It was held that the contract was not in the alternative, but con- [551] sisted of two terms: one, that the principals should perform their engagement, not merely by the delivery of some ma-

<sup>1</sup> Gridley v. Capen, 72 Ill. 11.

<sup>5</sup> Head v. Green, 5 Biss. 311.

<sup>2</sup> Tuton v. Thayer, 47 How. Pr. 180.

<sup>6</sup> Fisher v. Cutter, 20 Mo. 206.

<sup>3</sup> Id.

<sup>7</sup> Louisville M. Co. v. Welch, 10

<sup>4</sup> Hurd v. Callahan, 9 Abb. New How. (U. S.) 461.  
Cas. 374.



chinery, but of such as the contract required; the other, that if there should be a non-performance, whether excusable or not, the money advanced on the contract should be refunded to the extent that the principals were liable. The machinery delivered was imperfect so as to constitute a breach of the contract, and it was held that the surety was liable to such damages as would enable the plaintiffs to supply the deficiency; the jury were not required to assume that the contract price was the full value of the machinery.<sup>1</sup> Where the action was on a guaranty that stock should be worth \$700, market value, within one year from date, it was held that the true measure of damages was the difference between \$700 and \$500, the latter sum being the highest value reached in the market during the year, and not the difference between \$700 and \$300, the latter being the market value at the end of the year.<sup>2</sup> The defendant sold to a plaintiff certain shares of railroad stock, with a guaranty that it should yield annually six per cent. dividends for the space of three years. In an action on the guaranty it was held that its true construction was that the stock should be equal in value to stock yielding annually a dividend of six per cent.; the measure of damages in this action was the difference between the actual value of the stock transferred and a stock which should yield six per cent. annually for the next three years following the transfer.<sup>3</sup>

§ 730. **Indorsement of negotiable paper.** There is some conflict as to the effect of an indorsement made by a third person in blank upon a negotiable note at or after its inception. In New York the contract implied, according to the intermediate decisions, is that of an indorser, and parol evidence cannot be admitted to modify it.<sup>4</sup> In the case<sup>5</sup> which [552] established this doctrine in that state the chancellor said: "I fully concur in the opinion expressed by Mr. Justice Bronson,<sup>6</sup> that where a man writes his name in blank upon the back of a promissory note, he only agrees that he will pay the note

<sup>1</sup> Benjamin v. Hillard, 23 How. (U. S.) 149.

<sup>2</sup> Woodward v. Powers, 105 Mass. 108.

<sup>3</sup> Struthers v. Clark, 30 Pa. St. 210; Morris v. Barrett, 24 Ohio St. 201.

<sup>4</sup> Seabury v. Hungerford, 2 Hill, 80; Hall v. Newcomb, 7 Hill, 416; Spies v. Gilmore, 1 N. Y. 321.

<sup>5</sup> Hall v. Newcomb, *supra*.

<sup>6</sup> In Seabury v. Hungerford, 2 Hill, 80.

to the holder on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he has indorsed the paper to enable the maker to raise money on it does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. . . . And for the courts to allow proof by parol to charge a mere surety beyond the legal effect of his written blank indorsement on such paper would bring them in direct conflict with the provisions of the statute of frauds." The more recent cases modify this rule so far as to allow the presumption that an indorsement in blank before the note is completed by delivery was made for the purpose of becoming liable as second indorser, to be rebutted by proof that it was made to give the maker credit with the payee.<sup>1</sup>

In Connecticut the contract which the law implies, *prima facie*, from a blank indorsement of a promissory note, whether negotiable or not, is that it is due and payable according to its terms; that the maker shall be able to pay, and that it is collectible by the use of diligence.<sup>2</sup> But the blank indorsement is only *prima facie* evidence of such contract; it is competent between the parties to the indorsement to prove by parol the agreement which was in fact made at the time of the indorsement.<sup>3</sup> Where, however, there is an express guaranty of payment, it is held to be an absolute engagement on the part of the guarantor that the note shall be paid within the time specified therefor by the maker or himself.<sup>4</sup> But, generally, the stranger who indorses before delivery is liable as an original promisor, or as a guarantor;<sup>5</sup> and one not a holder indorsing

<sup>1</sup> Coulter v. Richmond, 59 N. Y. 478; Phelps v. Vischer, 50 id. 69.

<sup>2</sup> Perkins v. Catlin, 11 Conn. 213; Laflin v. Pomeroy, id. 440; Huntington v. Harvey, 4 id. 124; Bond v. Storrs, 13 id. 412; Castle v. Candee, 16 id. 223; Clark v. Merriam, 25 id. 576; Ranson v. Sherwood, 26 id. 437; Forbes v. Rowe, 48 id. 413.

<sup>3</sup> Id.; Beckwith v. Angell, 6 Conn. 315.

<sup>4</sup> Breed v. Hillhouse, 7 Conn. 522. But see Sage v. Wilcox, 6 id. 81.

<sup>5</sup> Samson v. Thornton, 3 Met. 275; Hunt v. Adams, 5 Mass. 358; Ulen v. Kittridge, 7 id. 233; White v. Howland, 9 id. 314; Burton v. Hansford, 10 W. Va. 470; Boynton v. Pierce, 79 Ill. 145; Underwood v. Hossack, 38 Ill. 208; Carroll v. Weld, 13 Ill. 682; White v. Weaver, 41 Ill. 409; Champion v. Griffith, 13 Ohio, 228; Seymour v. Mickey, 15 Ohio St. 575; Van Doren v. Tjader, 1 Nev. 380; Fuller v. Scott, 8 Kan. 25; Chandler v. Westfall, 30 Tex. 475; Horton v.

[553] afterwards a guarantor.<sup>1</sup> The rule which governs the federal courts is thus stated by Clifford, J.: "Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor, and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor; but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded such an indorser by the commercial law."<sup>2</sup> In several states the *prima facie* liability of one who indorses in blank before the payee has received the note is that of indorser.<sup>3</sup> It is generally held that a blank signature or indorsement in pursuance of a special undertaking authorizes the real agreement to be written over the name afterwards by the holder; and that an agreement so filled up will satisfy the statute of frauds.<sup>4</sup>

Manning, 37 Tex. 23; Pahlman v. Taylor, 75 Ill. 629; Clapp v. Rice, 13 Gray, 403; Schmidt v. Schmaelter, 45 Mo. 502; Chaffee v. Jones, 19 Pick. 260; Martin v. Boyd, 11 N. H. 385; Chaffee v. Memphis, etc. R. Co., 64 Mo. 193; Heise v. Bumpass, 40 Ark. 545; Kiskadden v. Allen, 7 Colo. 206; Harding v. Heirs of Waters, 6 Lea (Tenn.), 324; Cayuga Nat. Bank v. Dunklin, 29 Mo. App. 442; Polkinghorne v. Hendricks, 61 Miss. 366; Woodman v. Boothby, 66 Me. 389; Ives v. Bosley, 35 Md. 262; Stein v. Passmore, 25 Minn. 256; Rothschild v. Grit, 31 Mich. 150; Baker v. Robinson, 63 N. C. 191; McGee v. Connor, 1 Utah, 92.

<sup>1</sup>Tenney v. Prince, 4 Pick. 385; Thomas v. Jennings, 5 Sm. & M. 627; Rey v. Simpson, 22 How. (U. S.) 341; Whiton v. Mears, 11 Met. 563; Killian v. Ashley, 24 Ark. 511; Stagg v. Lin-

nenfelter, 59 Mo. 336; Hayden v. Weldon, 43 N. J. L. 128.

<sup>2</sup>Martin v. Good, 95 U. S. 90, 97; Miller v. Ridgely, 22 Fed. Rep. 889; First Nat. Bank v. Lock-Stitch Fence Co., 24 id. 221.

<sup>3</sup>Kealing v. Vansickle, 74 Ind. 529, and cases in that court cited on page 538; Cogswell v. Hayden, 5 Ore. 22; Milton v. De Yampert, 3 Ala. 648; Arnold v. Bryant, 8 Bush, 668; Jones v. Goodwin, 39 Cal. 493; Fisk v. Miller, 63 id. 367; Fessenden v. Summers, 62 id. 484; Eilbert v. Finkbeiner, 68 Pa. St. 243; Zahm v. First Nat. Bank of Lancaster, 103 id. 576.

<sup>4</sup>Tenney v. Prince, 4 Pick. 385; Josselyn v. Ames, 3 Mass. 274; Campbell v. Butler, 14 Johns. 349; Nelson v. Dubois, 13 id. 175; Reynolds v. Ward, 5 Wend. 501; Fulton v. Matthews, 15 Johns. 433; Turner v. Burrows, 8 Wend. 144; Russell v. Lan-

Whether written or not, it is open to proof;<sup>1</sup> but in a case within the statute it must be written.<sup>2</sup>

**§ 731. Methods by which suretyship assumed for commercial paper.** A contract of suretyship may arise in various ways in connection with commercial paper. The maker of a note and the acceptor of a bill are the primary debtors thereon to the holder or his assigns for whose benefit either may be made. They may, as they often do, assume that liability for the accommodation of some other party to the paper, or a third person; they thus become sureties for the person accommodated.<sup>3</sup> In his hands, as holder, the paper would be satisfied; for being ultimately liable to the maker or acceptor, who is ostensibly bound as primary debtor thereon for anything he may have to pay, such holder is not permitted to recover from him; his claim on the paper is for precisely the same sum that the accommodation maker or acceptor on payment would be entitled to demand from him as their principal by way of indemnity; and to prevent circuity of action, when he becomes its owner the paper is canceled.<sup>4</sup> Thus, a note payable to a firm was signed by one of its members, and two other persons as sureties; in an action by the other member against the sureties, it was held that, as the member signing the note was on the face of it entitled to one-half of the [554] amount, the sureties were liable only for the other half, although there was a mistake in making it payable to the firm instead of the plaintiff alone, unless the sureties knowingly agreed to the making of the note as the plaintiff alleged it ought to have been made.<sup>5</sup> So a note or bill may be indorsed by a surety to give it value for negotiation in the hands of the payee or any subsequent holder. While such paper, valid in its inception, is held by any person except the accommodated party, deriving title from him for whose benefit it was made, it is enforceable against the accommodation maker,

stoffe, 2 Doug. 514; *Collis v. Emett*, 1 H. Bl. 313; *Violett v. Patton*, 5 Cranch, 151; *Welsh v. Ebersole*, 75 Va. 651; *Harding v. Heirs of Waters*, 6 Lea (Tenn.), 324.

<sup>1</sup> *Welsh v. Ebersole*, 75 Va. 651; *Jones v. Dow*, 142 Mass. 130; *Oakley v. Boorman*, 21 Wend. 588.

<sup>2</sup> *Hayden v. Weldon*, 43 N. J. L. 128; *Moore v. Folsom*, 14 Minn. 340.

<sup>3</sup> *Bank of Toronto v. Hunter*, 20 How. Pr. 292.

<sup>4</sup> Vol. 1, § 143.

<sup>5</sup> *McMicken v. Webb*, 6 How. (U. S.) 292.



acceptor or indorser in the same manner and for the same amount as though he was not a surety. The drawer of an accepted bill, and the indorsers of notes and bills, are secondarily liable to the holder, and are in a certain sense sureties. When their liability becomes fixed by demand and notice the holder is *prima facie* entitled to recover from either the face amount of the paper; but between immediate parties, indorsee against his indorser, or payee against drawer, the consideration of the transfer between them may be inquired into, and if the plaintiff has discounted the paper at a larger rate than the interest, or has paid less than its face value, the amount paid and interest is the measure of damages exclusive of costs of protest and damages on bills.<sup>1</sup> This is the measure of liability implied by law from the manner in which the drawer and indorsers become parties.

§ 732. **Measure of guarantor's liability.** In cases of guaranty of payment, either express or implied, the rule is not the same. It is true that that consideration is open to examination when a simple contract, and now generally by statute even when under seal; but not with a view to limiting the recovery to it, or to give weight to any complaint of inadequacy.<sup>2</sup> The undertaking of the grantor is commensurate with that of [555] the principal debtor;<sup>3</sup> and the general principle applies that the injured party is entitled to recover a sum as damages for the breach of a contract which is equivalent to the benefit he would have derived from its performance.

In New York a few cases have been determined exceptionally, that is, on the principle that a guarantor, like an indorser, is only liable for the amount paid; but they are believed to be departures from the general rule applicable to guaranties. In one of these cases<sup>4</sup> a note for \$210, payable to the defendant or bearer, was sold by him to the plaintiff for \$200, and he guarantied the payment of it. The plaintiff brought suit

<sup>1</sup> *Braman v. Hess*, 13 Johns. 52; *Coffeen*, 76 Ill. 245; *Cook v. Clark*, 4 Wright v. Butler, 6 Wend. 284; *E. D. Smith*, 213; *French v. Grindle*, *Powell v. Waters*, 17 Johns. 176; 15 Me. 163; *Lobdell v. Baker*, 3 Met. *Baker v. Arnold*, 3 Cai. 279; *Munn* 469; *Cobb v. Titus*, 10 N. Y. 698.  
<sup>2</sup> *Oakley v. Boorman*, 21 Wend. 588.  
<sup>3</sup> *Schaeffer v. Hodges*, 54 Ill. 337; <sup>3</sup> *Gage v. Lewis*, 68 Ill. 604; *Lombard v. Mayberry*, 24 Neb. 674.  
<sup>4</sup> *Mazuzan v. Mead*, 21 Wend. 285.

on this guaranty to recover only the amount he had paid, and it was insisted for him that the rule between indorsee and indorser applied.<sup>1</sup> The defendant set up the defense of usury because for \$200 he agreed to pay \$210, with interest on the latter sum from a previous day. Cowen, J., said: "It is answered that an usurious intent is not to be inferred, inasmuch as the plaintiff cannot in legal effect recover, and does not in truth seek to recover, more than he advanced with the legal interest. If such were the express agreement at the time, it would clearly take away the sting of usury; and if that appear upon the face of the declaration to be but the legal effect of the guaranty then the case is the same. Had the defendant simply indorsed the note, leaving himself to be charged in the usual way by demand and notice, the transaction would not have been usurious." It was considered as depending on the same principle as *Cram v. Hendricks*.<sup>2</sup> In another case<sup>3</sup> a bond and mortgage for \$3,000, payable one year from date, with interest to become due half-yearly, and on which over five months' interest had already accrued, were assigned absolutely by the holder for \$2,600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3,000, and contained a covenant that that amount was due and owing on the bond and mortgage. At the time of executing the assignment the assignor also executed to the assignee a bond with surety conditioned that the mortgagor should pay \$3,000, together with the interest, by the day appointed for that purpose, in the securities assigned. [556] On a bill filed by the assignor to set aside the assignment, and to have the bond of guaranty canceled, it was held that the transaction was on its face a mere sale of a chose in action, unconnected with a loan, and therefore not *per se* usurious. It was declared also, that in an action upon a bond of guaranty the assignee's recovery would be limited to the actual amount paid for the bond and mortgage. Cowen, J., dissented, and in his opinion opposes the principle of the preceding case. He says: "The supreme court ruled the same way as this court did on what were believed to be equivalent circumstances, but on the express authority of a court having

<sup>1</sup> *Braman v. Hess*, 13 Johns. 52.

<sup>3</sup> *Rapelye v. Anderson*, 4 Hill, 472.

<sup>2</sup> 7 Wend. 569.

power to review the decision." That a guaranty of payment and an indorsement are equivalent circumstances is expressly affirmed by the senators who delivered the prevailing opinions; that is, equivalent in the aspect in which they were considered—in an action by the guarantee or indorsee that the amount recoverable is the amount paid to the guarantor or indorser.<sup>1</sup>

<sup>1</sup> Franklin, Senator, said: "But it is contended that this ought to be considered as a loan in consequence of a collateral bond having been given and received to secure the ultimate payment of the sum of \$3,000 and interest, for which the original bond and mortgage were given and for which only \$2,600 had been paid by the appellant. But I am unable to distinguish this case from that of *Cram v. Hendricks*, or from the still stronger one of *Mazuzan v. Mead* (21 Wend. 285), in which a note of \$210 was sold for \$200, being a greater discount than legal interest, and the seller guarantied, in express terms, to pay not only the \$200, but the amount payable by the face of the note. . . . If the condition of the bond of guaranty of Anderson and Remsen had been that in case John Anderson, the original obligor, did not pay the sum of \$3,000 and interest secured by his bond and mortgage, that then and in that case they would, it would have presented no stronger case than the indorsement of Cram on the note of Hendricks, or the guaranty mentioned in the case of *Mazuzan v. Mead*. The condition of this bond, however, is, not that Anderson and Remsen would pay the sum of \$3,000 and interest if the obligor John Anderson did not, but that if he did not pay that amount, then the bond was to be void, otherwise to remain in full force and virtue; so that upon the principle laid down and decided in the case of

*Cram v. Hendricks* and *Mazuzan v. Mead*, the amount which could be collected by Rapelye would have been, not the consideration expressed in the assignment, or the amount for which the bond and mortgage of John Anderson were given, but the actual sum received, being \$2,600, together with the interest which might have accrued thereon from the time of the actual receipt thereof."

Bockee, Senator, said: "The guaranty above mentioned is that the mortgagor, John Anderson, shall pay the \$3,000. It is not in the alternative that the obligors shall pay that sum. If John Anderson does not pay, the obligors are left merely on the ground of their legal liability. The judgment is entered for the sum of \$6,000, and the court may direct by indorsement on the execution a collection of the sum equitably due, or, on an assessment of damages by a jury, they may award the sum actually paid on the assignment and sale of the mortgage. It may be admitted that *prima facie* the rule of damages would be the sum of \$3,000, the consideration mentioned in the assignment. So it was in the case of *Cram v. Hendricks*. Cram stood on the ground of legal liability as general indorser of a promissory note, and the rule for damages against him was, *prima facie*, the amount of the note. The court, by limiting the amount of recovery to the actual consideration of the indorsement, re-

While it is true that an indorsement in blank is by [557] legal construction a guaranty only of the payment of the note to the amount paid on its transfer with interest, it must be equally true that where the agreement is not left to be implied from a simple indorsement, but is expressed, the latter will have effect according to the intent which is thus manifested; and if the undertaking is that the principal debtor shall pay the amount of the note, or if the guarantor undertakes directly to pay the sum mentioned in it on the default of the maker or other condition fulfilled, in either case that sum will, on general principles, be the measure of damages in the action upon the guaranty.<sup>1</sup>

In another case in New York, decided the same year as the first of the preceding cases,<sup>2</sup> the court expressly ruled that the obligation of a guarantor is not to be measured by the consideration paid when the intent is clear to secure the full amount of the paper guaranteed. Cowen, J., said: "It is not for us to hamper Mr. O., or any other citizen, in such a way as to preclude his making money by insuring the debts of his neighbors. It is enough that he has not been imposed upon. He is *sui juris*. He fixed the consideration of his indorsement; and had it been to secure a much larger amount the result must have been the same. There is no distinction in principle between an indorsement to secure future ad- [558] vances and an indorsement to secure a precedent debt."

§ 733. **Guaranty of collectibility; liability for costs; diligence.** A guaranty of collection is in legal effect an undertaking to pay the debt, if it cannot be made by diligent legal measures from the principal debtor; or any deficiency after all remedies are exhausted. It is only in that event, and to that extent, that such a guarantor can be put in default; payment according to that measure will satisfy his undertaking. There is some diversity as to the necessity of a judgment and return of execution unsatisfied against the principal debtor as an absolute condition to suit on such a guaranty.<sup>3</sup> But it is

fused to give a construction which would render the contract usurious." 483, 486, 491; *Yankey v. Lockheart*, 4 J. J. Marsh. 277.

*Goldsmith v. Brown*, 35 Barb. 484; <sup>2</sup> *Oakley v. Boorman*, 21 Wend. 588.

*Jones v. Stienbergh*, 1 Barb. Ch. 250. <sup>3</sup> In New York, Wisconsin, Michi-

<sup>1</sup> See *Anderson v. Rapelye*, 9 Paige, gan, Kentucky, Texas and Iowa the



agreed that the guarantor is only answerable if, and to the extent, the debt is uncollectible against the principal debtor. When a note is guarantied to be collectible the legal remedy against all prior solvent parties, such as an indorser,<sup>1</sup> the estate of a deceased indorser,<sup>2</sup> and all of several principals,<sup>3</sup> must be exhausted before the guarantor is in default.<sup>4</sup> Such

rule is that ordinarily the only evidence that a claim is not collectible is the failure of legal proceedings, diligently pursued, to result in its collection. *Toles v. Adey*, 91 N. Y. 562; *Schmitz v. Langhaar*, 88 id. 503; *Moakley v. Riggs*, 19 Johns. 69; *Craig v. Parkis*, 40 N. Y. 181; *Ralph v. Eldredge*, 58 Hun, 203; *Borden v. Gilbert*, 13 Wis. 670; *Bosman v. Akeley*, 39 Mich. 710; *Ely v. Bibb*, 4 J. J. Marsh. 71; *Shepard v. Phears*, 35 Tex. 71; *Durand v. Bowen*, 73 Iowa, 573. The same rule has been announced by at least one of the federal courts. *Dwight v. Williams*, 4 McLean, 581. In New York nothing beyond an execution is required of the creditor. *Schmitz v. Langhaar*, 88 N. Y. 503. In Ohio, Pennsylvania, Massachusetts, Maine, Vermont and Connecticut the institution of a suit is not necessary if the debtor is insolvent, and proof of the waiver of the condition by the guarantor is allowed. *Stone v. Rockefeller*, 29 Ohio St. 625; *McDoal v. Yeomans*, 8 Watts, 361; *McClurg v. Foyer*, 15 Pa. St. 293; *Miles v. Linnell*, 97 Mass. 298; *Gillingham v. Boardman*, 29 Me. 79; *Bull v. Bliss*, 30 Vt. 127; *Allen v. Rundle*, 50 Conn. 1; *Lemmon v. Strong*, 55 id. 443. If the degree of diligence to be exercised by the creditor is stipulated in the contract it must be used. *Allen v. Rundle*, *supra*. Compare *Heralson v. Mason*, 53 Mo. 211. If legal proceedings have not been resorted to the proof must clearly show that the debtor was, when the obligation matured,

and continued to be, so utterly insolvent that an action against him would have been fruitless. *Osborne v. Thompson*, 36 Minn. 528. If the persons primarily liable have left the state and were insolvent, the creditor who has instituted suit is not bound to send executions against them to their present place of residence. *Cannden v. Doremus*, 13 How. (U. S.) 515. Where the creditor is required to resort to legal proceedings the surety need not make a request of him to do so. *Toles v. Adey*, 91 N. Y. 562. The loss of an opportunity to arrest a principal for whose amenability to process the sureties are bound is presumptively injurious to them without proof. *Id.*

<sup>1</sup> *Loveland v. Shepard*, 2 Hill, 139; *Dana v. Conant*, 30 Vt. 246; *Summers v. Barrett*, 65 Iowa, 292.

<sup>2</sup> *Benton v. Fletcher*, 31 Vt. 418.

<sup>3</sup> *Aldrich v. Chubb*, 35 Mich. 350; *Northern Ins. Co. v. Wright*, 70 N. Y. 445.

<sup>4</sup> *Brandt on Sureties. & Guar.* (2d ed.), § 100.

In *Sears v. Van Dusen*, 25 Mich. 351, the purchaser of an over-due note, the collection of which was guarantied by its prior owner, refused to receive the money from the maker and delayed for two years to sue upon it, during which time the latter became insolvent. The guarantor was held to be discharged. The exact effect of this case is not easily ascertainable; it has been approvingly cited on the point that the delay was fatal. *Clark v. Sickler*, 64

a guaranty not only binds him to pay the uncollectible debt, but also the costs of the action against the principal and other parties for its collection.<sup>1</sup> Where an action against the principal is required as a condition, this rule as to costs is manifestly just. In such a case the guarantee will not have the full benefit of the agreement unless the guarantor bears the expense of complying with the condition he has imposed.<sup>2</sup> Where other evidence will suffice to show the debt not collectible, so as to allow the guarantee to resort to the guarantor without first bringing a suit, the latter's liability for costs in a suit which is nevertheless brought must depend on [559] there being reasonable grounds to expect that the debt could be collected in whole or in part by the proceedings in which the costs were incurred. Where, on a guaranty of a mortgage, the guarantee incurred costs to foreclose it after a prior mortgage of the same premises had been foreclosed, a sale made and a deed delivered, it was held he could not recover the costs of such an unnecessary foreclosure.<sup>3</sup>

#### § 734. Guarantor's liability where collateral is given.

If the debt, the collection of which is guarantied, is collaterally secured, there is some conflict of decision on the question whether the guarantor is liable for that part of it which might be made by resort to the security. In a case in Ohio <sup>4</sup> where the collection of a note was guarantied, and, pursuant to an understanding when the guaranty was made, the creditor took security from the maker by mortgage of real estate, it was held that on default and bankruptcy of the

N. Y. 231. An unexcused delay of five and one-half years in bringing a suit against the debtor releases a guarantor. *Tiffany v. Willis*, 30 Hun, 266. In Connecticut the holder of a note is not bound to attach the real estate of the maker before proceeding against a guarantor. *Forbes v. Rowe*, 48 Conn. 413; *Allen v. Rundle*, 50 id. 588. While the creditor must exhaust all the property and securities in his grasp, he is not obliged to pursue every claim which his debtor may have, especially if it is contingent and uncertain, as the statutory

liability of the stockholders of a corporation. *National Loan & Building Society v. Lichtenwalner*, 100 Pa. St. 100.

<sup>1</sup> *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326; S. C., 3 Keyes, 161; *Tuton v. Thayer*, 47 How. Pr. 180.

<sup>2</sup> *Mosher v. Hotchkiss*, *supra*. See *Redfield v. Haight*, 27 Conn. 31; *Gilman v. Lewis*, 15 Me. 452.

<sup>3</sup> *Peck v. Cohen*, 40 N. Y. Super. Ct. 142. See *Brown v. Haven*, 37 Vt. 439.

<sup>4</sup> *Stone v. Rockefeller*, 29 Ohio St. 625.

maker the guarantee could at once pursue his remedy on the guaranty against the guarantor without exhausting it on the security. Gilmore, J., said: "In considering this question it is to be kept in mind that the plaintiff sues upon a contract of guaranty relating alone to the collectibility of the note upon the back of which it is indorsed. The terms of such a contract are to be construed strictly, and the words being those of the guarantor are to be taken most strongly against him. The law will not supply any condition which is not incorporated into the agreement, or to be fairly implied from the language used; and, in the absence of accident or mistake, it is presumed conclusively that the terms of the contract as agreed upon between the parties at the time are fully expressed in the written guaranty. It cannot be said that the contract sued upon and that set up by way of defense have any such necessary connection with each other as to require them to be read and construed together as constituting one contract. They are neither of the same nature nor between the same parties. They are therefore wholly independent of each other, and must be so regarded. As independent contracts each must be susceptible of performance according to its terms and legal effect. These contracts are respectively susceptible of such performance, and the guarantor is bound to perform according to the terms of guaranty sued upon; i. e., to pay the note at maturity if the maker fails to do so, and is then entirely insolvent and bankrupt. When he pays the note in accordance with the terms of his guaranty the contract set up in his answer will, in equity, at once inure to his benefit by substitution." This rule is sustained by other authorities.<sup>1</sup> The reasoning upon which it is rested is not very satisfactory. By the mortgage the creditor acquires a specific lien on the debtor's property for the debt; the insolvency and bankruptcy of the debtor has not affected that lien; hence, to the extent of that property so appropriated to satisfy the debt the insolvency or bankruptcy of the debtor is wholly immaterial. He has so much property, notwithstanding his insolvency or bankruptcy,

<sup>1</sup> Allen v. Woodard, 125 Mass. 400; Hayes v. Ward, 4 Johns. Ch. 123; Vance v. English, 78 Ind. 80; Watson Buck v. Sanders, 1 Dana. 187; Hill v. v. Sutherland, 1 Tenn. Ch. 208. See Bourcier, 29 La. Ann. 841. Gary v. Cannon, 3 Ired. Eq. 64;

subject to the appropriate process of a court for the satisfaction of the debt. The note and mortgage are connected, and, without exhausting the security afforded by the latter, the note in no proper sense could be treated as not collectible; to the extent that the debt could be made from such security it should be deemed collectible. In a Michigan case<sup>1</sup> the payee of a note secured by mortgage of real estate transferred the note and assigned the mortgage. He indorsed on the note a guaranty of collection, and it was held that he was not liable on the guaranty until resort had been had to the mortgage. In such a case it was considered that the guaranty does not refer merely to the personal responsibility of the guarantor. When, with the guaranty itself, the guarantor furnishes the means of obtaining payment in whole or in part and these means have been attached to the debt itself, and cannot be severed from it, the parties must be held to have contemplated the entire transaction and a resort to those means. Any other rule would be at variance with the object of such securities. Although a mortgage is in a strict sense only collateral to the debt, yet it is generally regarded as forming its chief value, and persons usually contract with that idea.<sup>2</sup>

**§ 735. Discharge or reduction of surety's responsibility by act of creditor.** A surety is a favorite of the law;<sup>3</sup> [561] and where any act is done by the obligee that may injure him, the courts are very glad to lay hold of it in his favor.<sup>4</sup> If the creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act required by the surety which his duty enjoins him to do, and the omission proves injurious, the surety will be discharged.<sup>5</sup> Courts of law and equity are governed by the same principles in determining whether a surety has been discharged by anything done by the creditor.<sup>6</sup> Whatever will exonerate a surety from liability

<sup>1</sup> *Barman v. Carhartt*, 10 Mich. 338; affirmed in *Johnson v. Shepard*, 35 Mich. 115.

<sup>2</sup> *Baxter v. Smack*, 17 How. Pr. 183; *Cady v. Sheldon*, 38 Barb. 103; *Vanderkemp v. Shelton*, 11 Paige, 28; 1 Clark, 321; *Brainard v. Reynolds*, 36 Vt. 614.

<sup>3</sup> *People v. Chalmers*, 60 N. Y. 154.

<sup>4</sup> *Law v. East India Co.*, 4 Ves. 824.

<sup>5</sup> 1 Story's Eq., § 325; *Woolley v. Louisville Banking Co.*, 81 Ky. 527, 538; *Crim v. Fleming*, 101 Ind. 154. See the notes to § 728, *ante*, for some cases peculiar to the relation of guarantor and guarantee.

<sup>6</sup> *Schroepell v. Shaw*, 3 N. Y. 446.



in equity will constitute a sufficient defense at law.<sup>1</sup> The relation demands from the creditor that he exercise good faith toward the surety. Hence if a master holding a guaranty for the faithful performance of a servant's duty discovers in the course of his service that the servant is dishonest, he must discharge him or at least notify those who are bound for him. If he does neither he takes upon himself the responsibility for losses thereafter sustained. His concealment of the fact is a fraud as to the sureties.<sup>2</sup>

**§ 736. Right of subrogation.** As a security for and means of reimbursement, a surety has a right of subrogation upon the performance of his contract; he is then entitled to stand in the place of the creditor as to all securities for the debt held or acquired by the latter, and to have the same benefit from them as the creditor might have had.<sup>3</sup> This right extends to all securities held by him for the payment of such debt at the time the same is paid, even though they were acquired without the knowledge of the surety, and after he became bound.<sup>4</sup> It does not depend upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the latter and the creditor, and is founded, not upon any contract, express or implied, but springs from the most obvious principles of natural justice.<sup>5</sup>

<sup>1</sup> *Id.*; *Baker v. Briggs*, 8 Pick. 128; *Springer v. Toothaker*, 43 Me. 381; *People v. Jansen*, 7 Johns. 332; *King v. Baldwin*, 2 Johns. Ch. 554; *Sailly v. Elmore*, 2 Paige, 497; *Viele v. Hoag*, 24 Vt. 46; *Heath v. Derry Bank*, 44 N. H. 174; *Watriss v. Pierce*, 32 id. 560; *Rogers v. School Trustees*, 46 Ill. 428; *Shelton v. Hurd*, 7 R. I. 403; *Wayne v. Kirby*, 2 Bailey L. 551; *Maxwell v. Connor*, 1 Hill Eq. 14; *State Bank v. Watkins*, 6 Ark. 123; *Smith v. Clopton*, 48 Miss. 66.

<sup>2</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Exch. 73; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23. See *Atlas Bank v. Brownell*, 9 R. I. 168; *Andrus v. Bealls*, 9 Cow. 693; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332.

<sup>3</sup> *Philbrick v. Shaw*, 62 N. H. 356; *Briggs v. Hinton*, 14 Lea (Tenn.), 233; *Cullum v. Emanuel*, 1 Ala. 23; *Heart v. Bryan*, 2 Dev. Eq. 147; *Marsh v. Pike*, 10 Paige, 595; *Eaton v. Hasty*, 6 Neb. 419; *Buchanan v. Clark*, 10 Gratt. 164; *Mathews v. Aikin*, 1 N. Y. 595; *McArthur v. Martin*, 23 Minn. 74; *In re Hewitt*, 25 N. J. Eq. 210; *Lewis v. Palmer*, 28 N. Y. 271; *Rice v. Rice*, 108 Ill. 199.

The surety's rights in this respect are not affected by the fact that the property upon which he bases his claim was mortgaged to him for another and prior debt. *Torp v. Gulseth*, 37 Minn. 135.

<sup>4</sup> *Scanland v. Settle*, Meigs, 169; *Smith v. McLeod*, 3 Ired. Eq. 390; *Wendell v. Highstone*, 52 Mich. 552.

<sup>5</sup> *Mathews v. Aikin*, 1 N. Y. 595.

When one has been compelled to pay a debt which [562] ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor, both may have been equally liable; but if, as between themselves, there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement.<sup>1</sup> He is entitled to recourse to all persons who stand in the relation of principal to him for reimbursement, and to all co-sureties for contribution. "Where the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and the *cestui que trust* against those who have participated in his wrongful acts."<sup>2</sup> Though the creditor has released the surety by surrendering a fund which he was entitled to, the former, if he has sustained damages from the principal's breach of his contract, may set off the amount against the surety's demand for the application of the fund to his benefit.<sup>3</sup>

This right in the surety does not extend to independent collateral securities, but enables him to be substituted in the creditor's place and stead to the debt and the instrument which is its evidence, and to hold it alive and enforceable as against the principal debtor.<sup>4</sup> Such instrument may be assigned to a third person.<sup>5</sup> The right of such person, when he owned the land bound for the debt, to buy the bond executed by the surety and sue upon it has been sustained.<sup>6</sup> "A bond, therefore, may survive payment, which can become merely purchase-money when it is a surety who buys. If under such circumstances payment will not kill it, still less will that constructive payment which is argued out of an assignment to the surety who is obligor. He may hold it till the principal debtor is in default and then enforce it as against him pre-

<sup>1</sup> McCormick v. Irwin, 35 Pa. St. 111; New York State Bank v. Fletcher, 5 Wend. 85; Huston v. Branch Bank, 25 Ala. 250; Boyd v. McDonough, 39 How. Pr. 389.

<sup>2</sup> Sheldon on Subrogation, § 29, approved in Blake v. Traders' Nat. Bank, 145 Mass. 13.

<sup>3</sup> St. Mary's College v. Meagher, 11 S. W. Rep. 608 (Ky.).

<sup>4</sup> Goodyear v. Watson, 14 Barb. 481; Chandler v. Higgins, 109 Ill. 602; Katz v. Moessinger, 110 id. 372.

<sup>5</sup> Chandler v. Higgins, 109 Ill. 602; Searing v. Berry, 58 Iowa, 20.

<sup>6</sup> Wadsworth v. Lyon, 93 N. Y. 201, 214.

cisely with the same effect as if he had been a co-obligor in the bond, for in equity that is what his covenant made him. The surety's payment of what, as to the creditor, is his own debt becomes a purchase as against the debtor primarily liable."<sup>1</sup> But the creditor who holds an obligation which is protected by collaterals furnished by the first indorser is not bound to account therefor to one who subsequently binds himself by a separate instrument to pay any sum, within a stated limit, that might not be collected on that obligation or from the security.<sup>2</sup> It was said by Sergeant, J., in stating a limitation to the general rule that a surety may avail himself of any security given the creditor by the debtor, "but where such means consist of the responsibility of an individual becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities which may give rise to new questions as to priority between the former and the latter surety; such latter surety stipulating at the instance of the principal to pay the debt suffers no absolute injustice in being obliged to do so, since he is compelled to perform no

<sup>1</sup> *Fairchild v. Lynch*, 99 N. Y. 359; *Searing v. Berry*, 58 Iowa, 21; *Crisfield v. State*, 55 Md. 192; *German American Savings Bank v. Fritz*, 68 Wis. 390; *New Bedford Inst. v. Hathaway*, 134 Mass. 69.

In *Mason v. Pierron*, 63 Wis. 239, 244, *Lyon, J.*, points out the distinction between the extent to which subrogation is granted in England and America. "It was formerly held in England, following the Roman law, that a surety subrogated to the rights of a creditor had precisely the same rights the creditor had and stood in his place; but in later times the rule has been restricted in that country, and it is there now held that the right of subrogation extends only to securities other than the obligation or instrument which is the evidence of the debt. Thus, if the debt be evidenced by a bond, payment by one of two sureties of the whole debt cancels the bond; or if it be upon a

judgment, such payment cancels the judgment, and the surety so paying becomes a mere general creditor of his co-surety, to whose demand none of the peculiar incidents of a debt upon specialty or judgment adheres. The courts of this country, however, have very generally adhered to the ancient rule, and hold that although the lien or obligation be extinguished at law by the payment of the debts, yet, for the benefit of the surety, it continues in equity in full force. The cases which illustrate the above propositions are very numerous in both countries. A great many of them will be found cited in *Story's Eq. Jur.* in the notes to sections 8, 492, 493, 495, 496, 499, *a, b, c*; 3 *Pom. Eq. Jur.*, §§ 1418, 1419 and notes." See *Fleming v. Beaver*, 2 *Rawle*, 128; *Edgerly v. Emerson*, 23 *N. H.* 555; *Brewer v. Franklin Mills*, 42 *id.* 292.

<sup>2</sup> *Tracy v. Pomeroy*, 120 *Pa. St.* 14.

more than he undertook, and he has no right to complain that he is not allowed to use as a payment by himself the money which proceeds from another person whom his principal was previously bound to save harmless."<sup>1</sup>

§ 737. **Creditor's duty to realize on securities.** If the creditor parts with or renders unavailable securities of any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of their value, because securities which the creditor is entitled to apply in discharge of his debt he is bound to apply or hold as a trustee ready to be applied for the benefit of the surety.<sup>2</sup> The latter in such case is discharged to the extent that he is injured.<sup>3</sup> A waste or misapplication of a pledge or other security or its avails,<sup>4</sup> or a fraudulent sale of property held as security at less than its value,<sup>5</sup> will entitle the surety to relief to the extent of his injury from such waste, sale, or sacrifice on such sale. Where securities are surrendered their value will be estimated as of

<sup>1</sup> Potts v. Nathans, 1 W. & S. 155.

<sup>2</sup> Theobald on Princ. & Surety, § 174; Cullum v. Emanuel, 1 Ala. 23.

<sup>3</sup> Cummings v. Little, 45 Me. 183; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Ives v. Bank of Lansingburgh, 12 Mich. 361; Wharton v. Duncan, 83 Pa. St. 40; Kirkpatrick v. Hawk, 80 Ill. 122; Foss v. Chicago, 34 id. 488; Rogers v. School Trustees, 46 id. 428; Pitts v. Congdon, 2 N. Y. 352; Bonney v. Bonney, 29 Iowa, 448; American Bank v. Baker, 4 Met. 164; Holland v. Johnson, 51 Ind. 346; Baker v. Briggs, 8 Pick. 122; Chester v. Bank of Kingston, 16 N. Y. 336; Finney v. Commonwealth, 1 Penn. 240; Hurd v. Spencer, 40 Vt. 581; Shannon v. McMullen, 25 Gratt. 211; Law v. East India Company, 4 Ves. 824; Port v. Robbins, 35 Iowa, 208; Taylor v. Jeter, 23 Mo. 244; Schroepell v. Shaw, 5 Barb. 580; Brandt on Sureties, & G. (2d ed.), § 440 *et seq.*; Bowen v. Groover, 77 Ga. 126; St. Mary's College v. Meagher, 11 S. W. Rep. 608; Allen v. O'Donald, 23 Fed.

Rep. 573; Smith v. McKean, 99 Ind. 101; Sterne v. Bank of Vincennes, 79 id. 549; Sterne v. McKinney, id. 578; Humphrey v. Hayes, 94 N. Y. 594; Grow v. Garlock, 97 id. 81; Doty v. Case & W. Thresher Co., 50 Hun, 595; Day v. Ramey, 40 Ohio St. 446; Kaufman v. Loomis, 13 Ill. App. 124; Brown v. Rathburn, 10 Ore. 158; Guild v. Butler, 127 Mass. 386; Hut-ton v. Campbell, 10 Lea, 170; Watson v. Read, 4 Baxter, 49; S. C., 1 Tenn. Ch. 196; Holt v. Manier, 1 Lea, 488; Sample v. Cochran, 82 Ind. 260 (it makes no difference that the obligation was not enforceable against the principal); Clow v. Derby Coal Co., 98 Pa. St. 432; Brennan v. Clark, 29 Neb. 385, 399.

<sup>4</sup> Phares v. Barbour, 49 Ill. 370; Vose v. Florida R. Co., 50 N. Y. 369; Wendell v. Highstone, 52 Mich. 552; Austin v. Belknap, 54 Vt. 495; Nelson v. Munch, 28 Minn. 314; Bixby v. Barklie, 26 Hun, 275; Hutchinson v. Woodwell, 107 Pa. St. 509, 520; Templeton v. Shakley, id. 370.

<sup>5</sup> Everly v. Rice, 20 Pa. St. 297.



the time they were given up, not at the time of the trial of an action against the surety; and if they are upon real property their value in the county in which it is situated governs.<sup>1</sup> The fact that there are other sureties on other notes given to secure portions of the same debt will not affect the defendant's right to be released to the full extent of the value of the surrendered securities, the other sureties not being parties to the action.<sup>2</sup> In order that the creditor's act shall have the effect stated upon a surety the former must have knowledge of the existence of the relation of principal and surety. If such fact does not appear otherwise it may be shown by extrinsic evidence.<sup>3</sup> The creditor is affected by knowledge acquired at any time before he does an act which alters the surety's rights.<sup>4</sup> It was contended in a recent Louisiana case that the sureties were not affected by a sale of their principal's property made by the creditor when the latter's judgment against the debtor was largely in excess of the amount for which they were bound. The theory of the creditor was "that, having a final and unqualified judgment against the defendant for \$33,000 as their agent, the plaintiff had the right to receive payment or securities from him for the deficiency which was not covered by the obligations of the sureties," which aggregated only \$10,000; that it had the right to appropriate property turned over by him to the satisfaction of the difference between those sums; that only when that difference was made up could the sureties complain of any application made of such property, and then only to the extent of any damage they had sustained. This contention was overruled and the sureties were adjudged to be released by the unauthorized sale of the securities received from their principal.<sup>5</sup> The principle of this

<sup>1</sup> Bank of Monroe v. Gifford, 79 Iowa, 300.

<sup>2</sup> Id.

<sup>3</sup> Harris v. Brooks, 21 Pick. 195; Carpenter v. King, 9 Met. 511; Wilson v. Foot, 11 id. 285; Horne v. Bodwell, 5 Gray, 457; Guild v. Butler, 127 Mass. 386.

<sup>4</sup> Guild v. Butler, *supra*; Pooley v. Harradine, 7 E. & B. 431; Bailey v. Edwards, 4 B. & S. 761; Ewin v.

Lancaster, 6 id. 571; Swire v. Redman, 1 Q. B. Div. 536, 542.

<sup>5</sup> New England Mut. Ins. Co. v. Randall, 42 La. Ann. 260. The code of Louisiana provides: "The surety is discharged when by the act of the creditor the subrogation to his rights, mortgages and privileges can no longer operate in favor of the surety."

case is undoubtedly correct. It finds support in the English cases which establish the proposition thus stated by Mr. Mayne: Where a debtor whose whole debt is covered by a guaranty becomes a bankrupt and a dividend is received, the creditor can of course only recover the balance from the surety. Where, however, only a portion of the debt is so secured the creditor cannot apply the dividend to the unsecured portion, and recover the whole of the residue from the surety. The latter has a right to have the dividend applied ratably to the whole debt, and a proportionate deduction made from the whole amount for which he is liable.<sup>1</sup> And so if the difference between his liability and the entire debt is covered by the guaranty of another person, each surety may claim a ratable deduction out of each pound of the amount of the debt to which their respective guaranties extend. The plaintiff cannot apply the whole of the dividends to either part of the demand at his own election and thus vary at his own pleasure the extent of the responsibility of the sureties.<sup>2</sup> In all these cases the court construed the contract by the surety as being a guaranty of a limited portion of the debt, in which case the surety who pays that portion has in respect of it all the rights of the creditor, including the right to a dividend.<sup>3</sup> A different case, however, arises where the surety undertakes to be liable for the whole of the debt, subject to a limitation that he is not to be called upon to pay more than a specified amount. In such a case the creditor is entitled to redeem the whole debt by any dividends he can obtain, and to call upon the surety to pay the balance to an amount not exceeding the sum for which he has become bound.<sup>4</sup>

A surety is also discharged by the tender of payment to the creditor, refused by him.<sup>5</sup> An informal offer of payment when refused by the creditor is generally construed as a mere

<sup>1</sup> Dumont v. Fry, 14 Fed. Rep. 293.

<sup>2</sup> Mayne on Dam. (4th Eng. ed.), 302, citing *Bardwell v. Lydall*, 7 Bing. 489; *Raikes v. Todd*, 8 A. & E. 846; *Gee v. Pack*, 33 L. J. (Q. B.) 49; *Thornton v. McKewan*, 1 H. & N. 525; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, 7 id. 680.

<sup>3</sup> See per Lord Hatherley, *Hobson v. Bass*, *supra*, at p. 794.

<sup>4</sup> *Ellis v. Emmanuel*, 1 Exch. Div. 157.

<sup>5</sup> *Joslyn v. Eastman*, 46 Vt. 258; vol. 1, § 271; *Spurgeon v. Smitha*, 114 Ind. 453; *Hayes v. Josephi*, 26 Cal. 535; *Sears v. Van Dusen*, 25 Mich. 351.

gratuitous indulgence, having no legal effect upon the surety's liability unless it operates to prejudice or hinder him. But if the principal is insolvent at the time such a tender is declined the case is different, and becomes one of positive wrong to the surety, discharging his liability.<sup>1</sup> So, if the creditor purchase property on which the debt for which the surety is bound is a lien, and removes it from the state;<sup>2</sup> if the creditor [563] has the means of satisfaction in his hands, and suffers such means to pass into the hands of the debtor;<sup>3</sup> or if a creditor of an estate, with surety, refuses to present his claims to the commissioners for adjustment when requested to do so, the surety will be discharged.<sup>4</sup> But where the surety applies to a court of chancery before suit is brought against him, as he may do, to be relieved from his obligation on a debt for which a decedent estate is primarily liable, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditor, the deficiency out of which the surety will be allowed to deduct his costs, and the balance, if any, will be paid to the creditor.<sup>5</sup>

Where the creditor has obtained a lien upon property by judicial process or judgment, and releases it, the surety for the debt will be discharged to the extent of the value of the property so released.<sup>6</sup> If the right of the creditor to resort to the principal debtor's property is lost in consequence of his exaction of unlawful interest, without the surety's knowledge, the latter is not liable.<sup>7</sup>

<sup>1</sup> *White's Adm'r v. Life Ass'n of America*, 63 Ala. 419; *Life Ass'n of America v. Neville*, 72 id. 517. See *Clark v. Sickler*, 64 N. Y. 231; disapproved of in *Spurgeon v. Smitha*, 114 Ind. 453, 456.

If a debtor owing two demands offers to pay one of them, and the creditor induces him to pay the other, the indorsers upon the demand the debtor designed to pay are not released. *Second Nat. Bank of Oswego v. Poucher*, 56 N. Y. 348.

<sup>2</sup> *McMullen v. Hinkle*, 39 Miss. 142.

<sup>3</sup> *Commonwealth v. Vanderslice*, 8 S. & R. 452.

<sup>4</sup> *McCollum v. Hinkley*, 9 Vt. 143. As to the rule under the Illinois statute of 1869, see *Huddleston v. Francis*, 124 Ill. 195, and cases there cited.

<sup>5</sup> *McCollum v. Hinkley*, 9 Vt. 143.

<sup>6</sup> *Moss v. Pettengill*, 3 Minn. 217; *Parker v. Nations*, 33 Tex. 210; *Jenkins v. McNeese*, 34 Tex. 189; *Mulford v. Estudillo*, 23 Cal. 94; *Bank v. For-dyce*, 9 Pa. St. 275; *Sterne v. Bank of Vincennes*, 79 Ind. 549; *Sterne v. McKinney*, id. 578. See *Lusk v. Ramsay*, 3 Munf. 417.

<sup>7</sup> *Small v. Hicks*, 81 Ga. 691.

§ 738. **Release limited to injury sustained.** The surety is not, however, discharged by release of securities or liens unless he is injured;<sup>1</sup> or no farther than his means of indemnity are impaired.<sup>2</sup> Thus a release of a part of the property included in the mortgage securing a debt, without more, will not discharge a surety; for, if there should still be enough left for his protection, he is entitled to have it subjected to the payment of the debt; and, if sufficient to pay it, he is not, of course, prejudiced by the partial release and cannot complain.<sup>3</sup> So the surrender of a fictitious or forged bond held as security will not affect the liability of a surety.<sup>4</sup> In *Cummings v. Little*<sup>5</sup> the defendants were joint and several promisors upon three notes payable to one Smith or order. Smith also held a mortgage from one of the defendants of personal property of less value than the amount of the notes. Afterwards, without consulting the other defendants, who were, in fact, sureties on the notes, though not signing as such, [564] he discharged the mortgage. The notes were transferred to the plaintiff by the payee after maturity. Davis, J., delivering the opinion, said: "It has been treated as a doubtful question whether the value of the property stated in the mortgage is not conclusive upon the parties. Admitting that it is conclusive, it is so only in regard to the value at the date of the mortgage. Any subsequent loss or depreciation may properly be taken into consideration in estimating the value of the property at the time when the mortgage was discharged. And it is obvious that the discharge of the mortgage could have injured the sureties only to the amount of the value of the property so estimated. And, though the sureties are discharged to that extent, for the excess of the amount due at the date of the discharge, over and above the value of the property when released, the sureties are still liable.<sup>6</sup> But it

<sup>1</sup> *Blydenburgh v. Bingham*, 38 N. Y. 371; *American Bank v. Baker*, 4 Met. 164.

<sup>2</sup> *Barhydt v. Ellis*, 45 N. Y. 107; *Vose v. Florida R. Co.*, 50 id. 375; *Underhill v. Palmer*, 10 Daly, 478; *Lewis v. Armstrong*, 80 Ga. 402; *Rowley v. Jewett*, 56 Iowa, 492; *Bedwell v. Gephart*, 67 id. 44.

<sup>3</sup> *Bonney v. Bonney*, 29 Iowa, 448.

<sup>4</sup> *Loomis v. Fay*, 24 Vt. 240.

<sup>5</sup> 45 Me. 183.

<sup>6</sup> *American Bank v. Baker*, 4 Met. 164; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; *Neff's Appeal*, 9 W. & S. 36; *Everly v. Rice*, 20 Pa. St. 297; *Payne v. Commercial Bank of Natchez*, 6 Sm. & M. 24.



does not follow that they are liable in this action. If an action at law can be maintained upon the note, it cannot be against the principal and sureties *jointly*. For, in such an action, the defendants cannot be separated in the judgment. They must stand or fall together. But they are not liable for the same amount. How, then, can judgment be entered up? There is no provision of law by which the principal may be held for the whole, and the sureties for a part only, and several executions issued accordingly. Nor has this court general equity powers, as in some of the states, by which, after judgment against all the parties, the plaintiff may be enjoined from enforcing it against the sureties for the whole amount. Therefore, in an action at law, unless they may prove the release of the collateral security as an entire defense to the action, they have no remedy.<sup>1</sup> In this action, if liable at all, they are liable for the whole amount of the note. Not being liable for the whole, they cannot be held in this suit for any part. If the plaintiff had released the principal he would have discharged the sureties. But a release of collateral securities of less value than the amount of the note discharged the sureties *pro tanto* only. As to the plaintiff's [565] remedy for the balance, it is unnecessary for us to express any opinion."<sup>2</sup>

Where the creditor has taken a security from his debtor, after a surety had become bound for the debt under an arrangement with the debtor, which binds the creditor in good faith to discharge the security upon an agreed event other than the actual payment of the debt, the discharge of the security pursuant to such an arrangement will not necessarily discharge the surety. This was held in a case<sup>3</sup> involving these facts: A creditor, after the failure of the surety, who was an accommodation indorser of a negotiable note not then due, applied to the maker of the note for further security, who thereupon made a mortgage of real estate sufficient to secure the debt upon the parol condition that the creditor should release the mortgaged premises upon the debtor's providing other satisfactory security, soon after which the debtor became bankrupt, and some months after, and before the note

<sup>1</sup> Baker v. Briggs, 8 Pick. 122.

<sup>3</sup> Pearl St. Cong. Society v. Imlay,

<sup>2</sup> See Carroll v. Bowie, 7 Gill, 34.

23 Conn. 10.

became due, the creditor accepted as security the indorsement of the note by a responsible person under the name of the original surety, and thereupon, without notice to the original surety, released the mortgaged premises. The fact that the mortgage had been taken and was held by the creditor came to the knowledge of the surety; but the parol agreement to discharge it was wholly unknown to him. It was held in a suit by the creditor against the original surety on the note so indorsed that the above facts constituted no valid defense.<sup>1</sup>

§ 739. **Creditor's duty to acquire liens.** The direct discharge of a lien or security for the debt, whether it be one created by contract, or obtained by attachment or execution levy, or by judgment, will relieve a surety to the extent that he suffers loss thereby; yet, where the loss of a security does not arise from a positive or affirmative act of the creditor, but results from his neglect to take some measures to protect or continue it, and render it effectual and productive, the surety has not always the same ground of complaint. As to securities in the hands of the creditor when the surety assumes his obligation, and the existence of which for what they purport to be must be presumed to be contemplated by the [566] surety, conscience and good faith may impose some obligation upon the creditor, assuring the surety against any undisclosed infirmity known to such creditor or traceable to his act;<sup>2</sup> and against any disappointment by the failure to do any act necessary to make such security effective. Thus, the failure of the creditor to have recorded the bill of sale of a vessel given him as security by the principal, in consequence of which she was taken possession of by a subsequent purchaser, was held to have discharged the surety to the full extent of her value.<sup>3</sup> Because of the duty to pay his principal's debt which the surety has assumed and the right vested in him to pay it and become subrogated to the privileges of the creditor, the latter is not bound to take active measures to obtain payment from the principal unless required to do so by the surety's contract; nor to obtain security; and it has been held that he is not bound to active diligence to preserve liens which he has ac-

<sup>1</sup> See *Sheehan v. Taft*, 110 Mass. 331.      <sup>3</sup> *Capel v. Butler*, 2 Sim. & Stew-

<sup>2</sup> *Hayes v. Ward*, 4 Johns. Ch. 123; art. 457.

*Russell v. Annable*, 109 Mass. 72.

quired subsequent to the surety becoming bound; that he may omit to bring suit, or otherwise to prefer the claim against the principal or his estate;<sup>1</sup> that he may omit to take out execution, or countermand one already issued before levy; may omit to revive a judgment to continue it as a lien, or to enroll it when essential to create a lien;<sup>2</sup> or may discontinue an action whether property has been attached or not.<sup>3</sup> If the surety has the same opportunity to administer upon the estate of his principal that the creditor has, equity will not hold the latter responsible for mere neglect.<sup>4</sup> The rule as stated by the Con-

<sup>1</sup> *Johnson v. Planters' Bank*, 4 Sm. & M. 165; *Cohen v. Commissioners*, 7 id. 437; *Cain v. Bates*, 35 Mo. 427; *Hathaway v. Davis*, 33 Cal. 161; *People v. White*, 11 Ill. 341; *Hooks v. Bank of Mobile*, 8 Ala. 580; *Minter v. Branch Bank*, 23 Ala. 762; *Fetrow v. Wiseman*, 40 Ind. 148; *Sibley v. McAllister*, 8 N. H. 389; *McBroom v. Governor*, 6 Port. 32; *Pearson v. Gayle*, 11 Ala. 278; *Ray v. Brenner*, 12 Kan. 105; *Villars v. Palmer*, 67 Ill. 204; *Mitchell v. Williamson*, 6 Md. 210; *Vredenberg v. Snyder*, 6 Iowa, 39; *Moore v. Gray*, 26 Ohio St. 525; *Ashby v. Johnston*, 23 Ark. 163; *Dye v. Dye*, 21 Ohio St. 86; *Richards v. Commonwealth*, 40 Pa. St. 146; *Hagood v. Blythe*, 37 Fed. Rep. 249; *Grisard v. Hinson*, 50 Ark. 229; *Benedict v. Olson*, 37 Minn. 431; *Edwards v. Dargan*, 30 S. C. 177; *Alexander v. Byrd*, 75 Va. 690; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 id. 491; *Clark v. Sickler*, 64 N. Y. 231 (no distinction made between indulgence with the expressed consent or even request of the creditor and silent delay if there is no change in the contract); *Wasson v. Hodshire*, 108 Ind. 26; *Star Wagon Co. v. Swezy*, 63 Iowa, 520; *Otis v. Von Storch*, 15 R. I. 41; *French v. Bates*, 149 Mass. 73, 81; *Smith v. Freyler*, 4 Mont. 489; *Harris v. Newell*, 42 Wis. 687; *Hawkins v. Mims*,

36 Ark. 145. But see *McCullum v. Hinkley*, 9 Vt. 143; *Dorsey v. Wayman*, 6 Gill, 59.

<sup>2</sup> *United States v. Simpson*, 3 Penn. 437; *Mandorff v. Singer*, 5 Watts, 172; *The Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Pickens v. Finney*, 12 Sm. & M. 468; *McGee v. Metcalf*, 12 Sm. & M. 535; *Bellows v. Lovell*, 4 Pick. 153; 5 id. 307; *Chipman v. Todd*, 60 Me. 282; *Schroeppell v. Shaw*, 3 N. Y. 446; *Terrel v. Townsend*, 6 Tex. 149; *Knight v. Charter*, 22 W. Va. 422; *Kindt's Appeal*, 102 Pa. St. 441; *Winton v. Little*, 94 id. 64; *First Nat. Bank of Charlotte v. Homesley*, 99 N. C. 531; *Forbes v. Smith*, 5 Ired. Eq. 369; *Brown v. Chambers*, 63 Texas, 131; *Crawford v. Gaulden*, 33 Ga. 173; *Lumsden v. Leonard*, 55 Ga. 374; *Fuller v. Tomlinson*, 58 Iowa, 111; *Adams & French Harvester Co. v. Tomlinson*, id. 129. See *Coombs v. Parker*, 17 Ohio, 289; *Wornell v. Williams*, 19 Tex. 180; *Herrick v. Orange Co. Bank*, 27 Vt. 584; 2 Am. Lead. Cas., notes to *Pain v. Packard* and *King v. Baldwin*, 364-418; note to *Rees v. Berrington*, 2 Lead. Cas. in Eq. 1867.

<sup>3</sup> *Bank v. Rogers*, 16 N. H. 9; *Barney v. Clark*, 46 id. 513; *Somersworth Savings Bank v. Worcester*, 76 Me. 327, applying the rule in New Hampshire in a case governed by its law.

<sup>4</sup> *Grindol v. Ruby*, 14 Ill. App. 439.

necticut court is sustained by the cases cited to this section: In order to discharge a surety there must be a release of "some mortgage, pledge or lien, some right or interest in property which the creditor can hold in trust for the surety and to which the surety, if he pays the debt, can be subrogated, and the right to apply or hold must exist and be absolute."<sup>1</sup> This rule will not apply where the failure to sue or the forbearance in other matters results from a contract between debtor and creditor,<sup>2</sup> although there is no injury sustained by the surety;<sup>3</sup> nor where the neglect is so gross as to amount to fraud.<sup>4</sup>

As the creditor is a trustee in respect to any security he may obtain for the debt for which a surety is bound, he would seem to owe, as a duty to the surety, ordinary diligence at least to preserve it. And when it is lost in consequence [567] of a want of that diligence, the surety is relieved to the same extent as when the creditor by a positive act relinquishes or otherwise renders it unavailing. The latter is not bound to exert himself to obtain a lien; but if he chooses to do so, he is bound to ordinary care and diligence in preserving it for the interest of all parties concerned.<sup>5</sup> In *Taft v. Gifford* <sup>6</sup> D. as

<sup>1</sup> *Glazier v. Douglass*, 32 Conn. 393; *Tyler v. Waddingham*, 58 id. 375, 398.

<sup>2</sup> *Forbes v. Sheppard*, 98 N. C. 111; *Stuart v. Lancaster*, 84 Va. 772; *Day v. Martin*, 78 id. 1; *Newark v. Stout*, 52 N. J. L. 35, 47; *Callaway's Ex'r v. Price's Adm'r*, 32 Gratt. 1; *Farnsworth v. Coots*, 46 Mich. 117.

<sup>3</sup> *Forbes v. Sheppard*, 98 N. C. 111.

<sup>4</sup> *Newark v. Stout*, 52 N. J. L. 35, 47.

<sup>5</sup> *City Bank v. Young*, 43 N. Y. 457; *Sherraden v. Parker*, 24 Iowa, 28; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Lochrane v. Solomon*, 38 Ga. 286; *Merchants' Bank v. Cordevoille*, 4 Rob. (La.) 506; *Saulet v. Trepagnier*, 2 La. Ann. 427; *Ramsey v. Westmoreland Bank*, 2 Penn. 203; *Watts v. Shuttleworth*, 5 H. & N. 235; *Gillespie v. Darwin*, 6 Heisk. 21; *Hayes*

*v. Little*, 52 Ga. 555; *Clopton v. Spratt*, 52 Miss. 251; *Slatterly v. Police Jury*, 2 La. Ann. 444; *Watson v. Alcock*, 1 Smale & Giff. 319; affirmed, 4 DeGex, Mac. & G. 242; *Ex parte Mure*, 2 Cox, 63; *Miller v. Berkey*, 27 Pa. St. 317; *Toomer v. Dickerson*, 37 Ga. 428; *Burr v. Boyer*, 2 Neb. 265; *Teaff v. Ross*, 1 Ohio St. 469; *Mayhew v. Crickett*, 2 Swanst. 185. See *Black River Bank v. Page*, 44 N. Y. 453.

There is a conflict of authority on this proposition. In Nebraska and Georgia it is held that the creditor's neglect to file a chattel mortgage exonerates the surety *pro tanto*. *Toomer v. Dickerson*, *Burr v. Boyer*, *supra*. The same rule is applied to such neglect of a real estate mortgage in Ohio (*Teaff v. Ross*, *supra*); but it is otherwise in Indiana and



principal, and G. as surety, gave a joint note to T., in March, 1841, payable in April, 1842. In April, 1843, T. demised a farm to D. for one year, by a written lease which contained a provision that the produce and profits of the farm should be holden for the payment (among other debts of D.) of the afore-said note. T. took no measures to obtain the produce of the farm, but permitted D. to dispose of it without objection; G. had no knowledge of these provisions in the lease until after D. had disposed of such produce. Held, in a suit by T. on the note, that his omission to obtain the produce of the farm and apply it to the payment or part payment of the note did not discharge G. from his liability to pay it in full. The principal was defaulted and the surety defended. His defense was put on the ground that the plaintiff voluntarily relinquished a security which was given him by the principal, and from which the whole or a part of the amount of this note might have been realized; that, by a rule of equity, adopted as a rule of law, the defendant is discharged in full or *pro tanto*. Shaw, C. J., said: "The court are of opinion that the facts do not bring the case within the principle stated, even supposing — of which we give no opinion — that this would be a good defense in a joint action upon a joint note against principal and surety. [568] The plaintiff received nothing under this provision. It was a mere executory agreement authorizing the plaintiff to take possession of the produce when it should come into existence; and if he had exercised that power and taken such possession before the right of any creditor or purchaser had intervened it might have given him a lien.<sup>1</sup> But until possession taken he had no lien, and could not hold the produce against a *bona fide* purchaser or attaching creditor.<sup>2</sup> And we think he was not bound to any active diligence in availing himself of the power to obtain a lien any more than the holder

South Carolina. *Philbrooks v. McEwen*, 29 Ind. 347; *Lang v. Brevard*, 3 Strobb. Eq. 59; *Hampton v. Levy*, 1 McCord Eq. 107.

If an assignee of the creditor takes securities held by him with knowledge of an express agreement between the former and the surety that they shall be collected, the failure to

use reasonable diligence to that end releases the latter, though he has not taken any steps to hasten the performance of the creditor's duty. *Crim v. Fleming*, 101 Ind. 154; *Smith v. McKean*, 99 id. 101.

<sup>1</sup> *Bartlett v. Williams*, 1 Pick. 288.

<sup>2</sup> *Jones v. Richardson*, 10 Met. 481.

of a note, with a surety, is bound to active diligence in securing his note by attachment of the property of the principal when he has an opportunity to do so.<sup>1</sup> It was a collateral security, not given at the time the note was made, but afterwards, and not taken with the knowledge or for the use and benefit of the surety. It was a means of obtaining a pledge at the option of the plaintiff, of which he might have availed himself or not, but it did not constitute an actual security. The plaintiff's forbearing to act upon this executory agreement, and taking no measures to enforce it, was not such a voluntary relinquishment of any pledge or security as to bring the case within the principle relied on by the defendant."<sup>2</sup>

§ 740. **Value of released securities.** Where the creditor has released a security to the benefit of which the surety would be entitled on the performance of his contract, whether the latter is injured, or on which party is the burden of proof in respect to the amount of damages, depends largely on the facts of the particular case. Where a judgment against the principal was discharged, and there was no proof as to its value, it was presumed to be of its face value.<sup>3</sup> This conclusion would seem to be correct on the general presumption of solvency, and without invoking the principle stated, which is undoubtedly correct, "that when the amount is made incapable of estimation by the act of the wrong-doer he must be made responsible for the value it may, by reasonable possibility, turn out to be of." A creditor who held sundry demands as a collateral security for a debt for which a [569] surety was also bound compromised with the debtors in such demands and sued the surety for such deficiency. The plaintiff insisted that these compromises were *prima facie* beneficial, rather than prejudicial, to the defendants, and if not so, it was incumbent on them to prove it, it being reported by the master that the compromises were made in good faith. The court said, however, that it was not sufficient for the plaintiff to prove that they acted in good faith. They might thus act,

<sup>1</sup> 1 Story's Eq., § 325.

<sup>2</sup> Grisard v. Hinson, 50 Ark. 229.

<sup>3</sup> Fielding v. Waterhouse, 40 N. Y. Super. Ct. 424.

Where a creditor relinquishes a

lien on his debtor's property the *onus* is on him, in a suit against the surety, to show that the latter was not injured thereby. Allen v. O'Donald,

23 Fed. Rep. 573.

on the opinion that they were authorized to make the compromise without consulting the sureties; or they might think the compromises would be beneficial to them. But if they have in fact been prejudicial and not beneficial, the plaintiffs are clearly responsible, and must account for the securities at their nominal or real value. And they are bound to prove all the facts and circumstances in reference to which the compromises were made. If these should be proved, and it should thereupon appear that the defendants have not been and cannot be prejudiced by the compromises, then another question would be raised, namely, whether the plaintiffs would be bound to account for the securities at their nominal or real value.<sup>1</sup> There is doubtless a presumption that the surety is injured by the release of any security, but this presumption would not of itself entitle him to any substantial deduction from the debt; but securities usually import a certain value or amount secured, and the value or amount thus indicated may usually be taken as a measure of the actual value in the absence of countervailing evidence.<sup>2</sup>

§ 741. **Surety's right to put creditor in motion.** The doctrine that a surety may call upon his creditor to collect the debt by legal proceedings against the principal debtor, although such duty is not expressly assumed by the contract, and that the surety is discharged to the extent that he is damaged by the creditor's delay, was established at law in *New York in Pain v. Packard*,<sup>3</sup> and approved by the court of errors in *King v. Baldwin*,<sup>4</sup> overruling the court of chancery.<sup>5</sup> The principle has not been formally denied, but the courts have not been disposed to apply it except in cases where the surety became such at the inception of the contract, or the relation had its origin in dealings between the parties originally bound by the contract subsequent to its inception of which the creditor had notice.<sup>6</sup> It does not apply where there is a guaranty of payment made by a vendor on the sale to the plaintiff of a

<sup>1</sup> *American Bank v. Baker*, 4 Met. 164.

<sup>2</sup> See *Cummings v. Little*, 45 Me. 183; *Vose v. Florida R. Co.*, 50 N. Y. 369.

<sup>3</sup> 13 Johns. 174.

<sup>4</sup> 17 Johns. 384.

<sup>5</sup> 2 Johns. Ch. 558.

<sup>6</sup> See *Trimble v. Thorne*, 16 Johns. 151; *Colgrove v. Tallman*, 67 N. Y. 95; *Remsen v. Beckman*, 25 id. 552.

bond and mortgage, the former receiving the full amount of the security as the consideration of the transfer, so as to release the defendant from liability on his guaranty by reason of the neglect of an assignee of the bond and mortgage to proceed after notice to collect it, the property meanwhile having depreciated in value, and the obligor having become insolvent.<sup>1</sup> The Tennessee and Pennsylvania courts have applied or recognized the same rule;<sup>2</sup> but it has been said by the former that it goes to the verge of the law.<sup>3</sup> A surety cannot claim any benefit from his notice and the creditor's neglect to act upon it unless he establishes the solvency of his principal at the time notice was given and his subsequent insolvency. The principal is not solvent unless he is able to pay all his debts according to the ordinary usage of trade.<sup>4</sup> The surety's notice must expressly state that he will consider himself discharged if the creditor does not proceed.<sup>5</sup> The existence of the right in the surety to put the creditor in motion and to claim any benefit from his failure to act pursuant to the notice is denied by the great weight of authority.<sup>6</sup>

In several states statutes have been enacted which empower the surety to call upon the creditor to pursue the debtor by legal proceedings, and release the surety from liability if he is injured by the creditor's neglect to do so. The recent cases construing these statutes are collected in the note below; for obvious reasons they cannot be treated of here.<sup>7</sup>

<sup>1</sup> Newcomb v. Hale, 90 N. Y. 326.

<sup>2</sup> Hancock v. Bryant, 2 Yerg. 476; Thompson v. Watson, 10 id. 362; Cope v. Smith, 8 S. & R. 110.

<sup>3</sup> Burrows v. Bank of Tennessee, 6 Humph. 440.

<sup>4</sup> Herrick v. Borst, 4 Hill, 650; Marsh v. Dunckel, 25 Hun, 167.

<sup>5</sup> Jackson v. Huey, 10 Lea (Tenn.), 184. See Hunt v. Purdy, 82 N. Y. 486; Coykendall v. Constable, 48 Hun, 360.

<sup>6</sup> Harris v. Newell, 42 Wis. 687; Hubbard v. Davis, 1 Aiken, 296; Hickok v. Farmers' Bank, 35 Vt. 476; Page v. Webster, 15 Me. 269; Mahurin v. Pearson, 8 N. H. 539; Bull v. Allen, 19 Conn. 101; Saseer

v. Young, 6 G. & J. 243; Pintard v. Davis, 21 N. J. L. 632; Broughton v. Duvall, 3 Call, 61; Dennis v. Rider, 2 McLean, 451; Carr v. Howard, 8 Blackf. 191; Turner v. Hale, 8 Kan. 38; Ingels v. Sutliff, 36 id. 444.

<sup>7</sup> Alexander v. Byrd, 85 Va. 690; Coles v. Ballard, 78 id. 139; Hayward v. Fullerton, 75 Iowa, 371; Moore v. Peterson, 64 id. 423; German American Bank v. Denmire, 58 id. 137; Medley v. Tandy, 85 Ky. 566; Clark v. Barrett, 19 Mo. App. 39; Boatmen's Savings Bank v. Johnson, 24 id. 316; Sisk v. Rosenberger, 82 Mo. 46; Hickam v. Hollingsworth, 17 id. 475; Koenig v. Bramlett, 20 Mo. App. 636; Clark v. Osborn, 41 Ohio St.



§ 742. Release of one or more of several parties. The creditor will discharge sureties, or reduce his recovery against them by releasing any party to whom they might have recourse for reimbursement or contribution after payment of the debt. Where the obligation is joint, a release of one, whether principal or surety, will, at law, discharge all; but the rule is otherwise in equity.<sup>1</sup> The discharge of the principal will always discharge the sureties; for he is bound to re-[570] imburse them; and if the creditor releases him, or he makes a successful defense to the action on the merits, he is no longer under that obligation.<sup>3</sup> Where a suit was brought against a sheriff and the two sureties on his official bond, on the first trial judgment was recovered against all; the sheriff appealed, but the sureties did not, and on the final trial he

28; *Baker v. Kellogg*, 29 id. 663; *Merrillan Silver Plate Co. v. Flory*, 44 id. 430; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 id. 492; *Darty v. Robinson*, 86 id. 382.

<sup>1</sup> *Rice v. Morton*, 19 Mo. 263; *State v. Matson*, 44 Mo. 305; *Towns v. Riddle*, 2 Ala. 694; *Woolley v. Louisville Banking Co.*, 81 Ky. 527, 539; *Potter v. Gronbeck*, 117 Ill. 404.

<sup>2</sup> A discharge under the national bankrupt act of 1867 did not affect the sureties (*Cilley v. Colby*, 61 N. H. 63; *Bank v. Simpson*, 90 N. C. 467); though such discharge could not have been obtained but for the creditor's act. *Ex parte Jacobs*, L. R. 10 Ch. 211; *Sigourney v. Williams*, 1 Gray, 623; *Guild v. Butler*, 122 Mass. 498. *Contra*, *Calloway v. Snapp*, 78 Ky. 561.

If the surety is fully indemnified against loss the release of his principal, without his consent and without payment, does not affect him. *Jones v. Ward*, 71 Wis. 152; *Fay v. Tower*, 58 id. 286. Nor will any act or omission of the creditor. *Crim v. Fleming*, 101 Ind. 154.

<sup>3</sup> *Beale v. Cochran*, 18 Ga. 38; *McClosky v. Wingfield*, 29 La. Ann. 141.

In *Bank v. Robinson*, 13 Ark. 214, it was held that if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on the trial on a plea to the merits which would inure to the benefit of both if sued jointly, as a plea of payment or accord and satisfaction, such judgment in favor of the principal is not an estoppel against the plaintiff if pleaded by the surety in bar of the action against him. There is no privity between principal and surety, and the parties are not the same in the two suits; the questions in one are not precluded by the decision in the other. While it is true that satisfaction from either will conclude the creditor, and prevent his obtaining it again, yet he is not concluded by the decision in one case so that he may not, in the other, insist that he has not received satisfaction. See *McKellar v. Howell*, 4 Hawks, 34; *Douglass v. Howland*, 24 Wend. 58; *Jackson v. Griswold*, 4 Hill, 528; *Hudson v. Robinson*, 4 M. & S. 475.

If a judgment is rendered against

was acquitted, it was held that the first judgment could not be enforced against the sureties.<sup>1</sup> If, however, when the principal is released the right of action against the sureties is reserved they are not discharged.<sup>2</sup> So if, in the discharge of one of several sureties, the right of action against the others is reserved their rights are not affected by such discharge; for the discharged surety will still be liable for contribution.<sup>3</sup> But without such reservation the discharge of one would be an injury to the others to the extent of such right to contribution. The release of one surety cannot be permitted to [571] increase the obligation of the others; therefore, so much of the debt as the released party would otherwise have been bound to pay by way of contribution is discharged by his release.<sup>4</sup> A Missouri statute abrogates the rule that the volun-

the maker of a non-negotiable note in proceedings supplementary to execution before notice is given of the assignment of the note, which judgment requires him to pay a certain portion of it to the judgment creditor's payee, such judgment is a defense *pro tanto* to the principal and his sureties in a subsequent action on the note by the payee or his assignee. *Bostwick v. Bryant*, 113 Ind. 448.

<sup>1</sup> *Trotter v. Strong*, 63 Ill. 272; *State v. Matson*, 44 Mo. 305; *Brown v. Ayer*, 24 Ga. 288; *Rogers v. School Trustees*, 46 Ill. 428; *Tyner v. Hamilton*, 51 Ind. 259; *Stockton v. Stockton*, 40 Ind. 225; *Vose v. Florida R. Co.*, 50 N. Y. 369; *McMillon v. McMillon*, 7 Lea, 78; *Coots v. Farnsworth*, 61 Mich. 497.

<sup>2</sup> *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316; *Tobey v. Ellis*, 114 Mass. 120; *Mueller v. Dobschuetz*, 89 Ill. 176; *Stirewell v. Martin*, 84 N. C. 4; *Morse v. Huntington*, 40 Vt. 488; *Hood v. Hayward*, 48 Hun, 330; *Smith v. Winter*, 4 M. & W. 454; *Boulton v. Stubbs*, 18 Ves. 20; *Kearsley v. Cole*, 16 M. & W. 128; *Owen v. Homan*, 3 Eng. L. & Eq. 125; *Ex parte Gifford*, 6 Ves. 805; *Note to*

*Dunn v. Slee*, 1 Holt's N. P. 399; *Kirby v. Turner*, 6 Johns. Ch. 242; *S. C.*, *Hopk. Ch.* 309; *Union Bank v. Beech*, 3 Hurl. & Colt. 672; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Hall v. Thompson*, 9 Up. Can. C. P. 257; *Green v. Wynn*, L. R. 4 Ch. App. 204; *S. C.*, L. R. 7 Eq. Cas. 28; *Hubbell v. Carpenter*, 5 N. Y. 171. See *Austin v. Dorwin*, 21 Vt. 38.

This rule governs where there is an agreement by the creditor not to sue the principal debtor within a stated time, and the right is reserved to sue the other parties who are bound. *Kenworthy v. Sawyer*, 125 Mass. 28; *Hagey v. Hill*, 75 Pa. St. 108. And where there is an absolute obligation not to sue one of several sureties. *Bowne v. Mount Holly Nat. Bank*, 45 N. J. L. 360.

<sup>3</sup> *Clapp v. Rice*, 15 Gray, 557; *Thompson v. Lack*, 3 C. B. 540; *S. C.*, 54 Eng. C. L. 540.

<sup>4</sup> *Gordon v. Moore*, 44 Ark. 349; *Jemison v. Governor*, 47 Ala. 390; *State v. Matson*, 44 Mo. 305; *Dodd v. Winn*, 27 Mo. 501; *Rice v. Morton*, 19 Mo. 263; *Sterling v. Forrester*, 2 Bligh, 575; *Hodgson v. Hodgson*, 2 Keen, 704; *Morgan v. Smith*, 70 N. Y. 537.

tary release of one surety discharges the liability of his co-sureties. But it has been ruled in equity, notwithstanding the statute, that where a levy made on the property of one surety by the request of a co-surety has been released by the creditor on the payment of a portion of the value of the property levied on, the other surety may claim the benefit of the full value of the property in diminution of his liability.<sup>1</sup>

§ 743. **Surety's right to defend between principals.** A surety has the right for protection of his own interest to defend a suit brought against his principal though not himself a party.<sup>2</sup> When sued with the principal he has, of course, the same right, and may set up any defense which pertains to the debt or demand. The payee of a note brought suit thereon for the use of a third person who had become the owner against one of the promisors, a surety; the consideration of the note was the sale of a tract of land by the payee to the principal. At the time of the sale there was an unsatisfied judgment against the vendor operating as a lien upon the land, and this judgment the beneficial plaintiff authorized the principal to discharge, promising to allow it as a credit against the note, and it was accordingly discharged. It was held that the promise to the principal inured to the surety; that it was a direct and original undertaking to allow the payment, not within the statute of frauds, and the instant it was made the note was extinguished *pro tanto*.<sup>3</sup> So where money was paid by a tenant for repairs which the landlord agreed to pay by deduction from the rent, it was held to be in effect a payment on account of rent, and as such should be allowed in favor of the surety.<sup>4</sup> He has a right to set up the defense that the contract was void in its inception, or any defense "inherent to the debt,"<sup>5</sup> but not those which are personal to the debtor.<sup>6</sup> He

<sup>1</sup> Lower v. Buchanan Bank, 78 Mo. 67.

<sup>2</sup> Jewett v. Crane, 35 Barb. 208.

An indemnitor who is not permitted to furnish evidence in defense of his principal is not bound by the judgment. Peterborough Real Estate Investment Co. v. Ireton, 5 Ont. 47.

<sup>3</sup> Cole v. Justice, 8 Ala. 793.

<sup>4</sup> Rosenbaum v. Gunter, 3 E. D. Smith, 203.

<sup>5</sup> Conger v. Babbet, 67 Iowa, 13; Huntress v. Patton, 20 Me. 28; Denison v. Gibson, 24 Mich. 187; Morse v. Hovey, 9 Paige, 197; Carrol Co. Savings Bank v. Strother, 28 S. C. 504.

<sup>6</sup> Baldwin v. Gordon, 12 Martin (La., O. S.), 373; Savage v. Fox, 60 N. H. 17; Wagoner v. Watts, 44 N. J.

cannot, however, control the principal in respect to a defense which may be waived by his act. Thus, a surety to a bond for the purchase-money of a tract of land cannot set up [572] eviction by title paramount from the greater part of the tract, for the purpose of avoiding the contract, when the principal himself has acquiesced in a *pro rata* abatement of the price.<sup>1</sup> The surety will not be precluded from making a defense merely because the principal will not join in it.<sup>2</sup> When the defense of usury is not available to the latter, it cannot be made by the surety; as where the principal is prohibited by statute from setting up that defense.<sup>3</sup> A bill was made by the principal in Ohio, taken to Virginia and there signed by the surety; it was usurious by the laws of Virginia but valid in Ohio, and it was held that the surety could not defend by recourse to the laws of Virginia.<sup>4</sup>

The failure of a surety to defend will not affect his right to indemnity unless it results from negligence in a case where an appearance would have been beneficial to the principal.<sup>5</sup> The surety, when sued alone, may preserve his right to indemnity by giving his principal notice of the action and imposing upon him the responsibility of the defense. In such a case the prin-

L. 126; Wiggins' Appeal, 100 Pa. St. 155; Winn v. Sanford, 145 Mass. 302; Kimball v. Newell, 7 Hill, 116; Weed Sewing M. Co. v. Maxwell, 13 Mo. 486.

It is generally held that the defense of duress at common law, where no statutory right has been violated, is personal to the individual who has been subjected to it. *Hanscombe v. Standing*, Cro. Jac. 187; *Wayne v. Sands*, 1 Freeman, 351; *Oaks v. Dustin*, 79 Me. 23; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Robinson v. Gould*, 11 Cush. 55. There is an exception to the rule when the surety is a husband, wife, parent or child, and the principal is either of these. *Harris v. Carmody*, 131 Mass. 51, and cases there cited. And where a statutory right is violated. *Thompson v. Lockwood*, 15 Johns. 256; *Hawes v. Marchant*, 1 Curt. 136.

Also where the indorser of a note becomes such without knowing that it was executed by the maker under duress at the hands of the holder. The indorser in such a case is deprived of his right of subrogation. *Griffith v. Sitgreaves*, 90 Pa. St. 161. See, as indicating a contrary view on the general proposition, *Strong v. Grannis*, 26 Barb. 122; *Osborn v. Robbins*, 36 N. Y. 365.

<sup>1</sup> *Commissioners v. Executors of Robinson*, 1 Bailey, 151.

<sup>2</sup> *Morse v. Hovey*, 9 Paige, 196.

<sup>3</sup> *Rosa v. Butterfield*, 33 N. Y. 665; *Belmont Branch of State Bank v. Hoyer*, 35 N. Y. 65; *Union Nat. Bank v. Wheeler*, 60 N. Y. 612; *Savage v. Fox*, 60 N. H. 17. See *Merchants' Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635.

<sup>4</sup> *Pugh v. Cameron*, 11 W. Va. 523.

<sup>5</sup> *Doran v. Davis*, 43 Iowa, 86.



cipal is bound by the judgment.<sup>1</sup> Where the surety so sued notifies his principal so as to enable him to defend, or to furnish the surety with a defense, the judgment is conclusive between them where there is no collusion; and, if satisfied by the surety, is the measure of damages against the principal. It would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him.<sup>2</sup> The surety's failure to defend or give the principal notice will not prejudice his right to recover from the latter what he is compelled to pay unless he knows of a defense.<sup>3</sup>

[573] § 744. **Surety may set up right of recoupment.** The weight of authority favors the right of the surety to set up the principal's defense consisting of a right of recoupment.<sup>4</sup> In the Michigan case cited the principal was sued with the surety on a note given for the price of personal property sold with warranty, and it was insisted that the two defendants were not entitled to recoup the damages arising on the breach of warranty on a sale to one. Christiancy, J., said: "If recoupment were allowed on the same principle as set-off merely, this objection would be insurmountable. A set-off is in the nature of a cross-action to the full extent; it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and the defendant is entitled to judgment upon any surplus of his claims beyond those of the plaintiff. A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of, or connected with, the

<sup>1</sup> Konitzky v. Meyer, 49 N. Y. 571; Aultman & T. Co. v. Heffner, 67 Hare v. Grant, 77 N. C. 203; Rice Texas, 54, 62; Hollister v. Davis, 54 v. Rice, 14 B. Mon. 417; Thomas v. Pa. St. 508; Cole v. Justice, 8 Ala. Beckman, 1 B. Mon. 29; Wallace v. 793; Becker v. Northway, 44 Minn. Straus, 113 N. Y. 228. 61; Himrod v. Baugh, 85 Ill. 435;

<sup>2</sup> Hare v. Grant, 77 N. C. 203.

<sup>3</sup> Williams v. Greer, 4 Hayw. 235; Brundridge v. Whitecomb, 1 Chip. Stinson v. Brennan, Cheves, 15. See (Vt.) 180; Jarratt v. Martin, 70 N. C. Harley v. Stapleton, 24 Mo. 248. 459; McHardy v. Wadsworth, 8 Mich.

<sup>4</sup> Andrews v. Varrell, 46 N. H. 17; 349; Waterman v. Clark, 76 Ill. 428.

contract or transaction which forms the basis of the plaintiff's cause of action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. . . . Now the only consideration given for the note was received by . . . [one of the defendants.] [The other] . . . though a joint maker in form, would seem to have been, as between himself and the other defendant, but a surety; and it is difficult to discover any good reason why he should not be entitled to any defense connected with the consideration which would be available to the real principal in the transaction had he made the note and been sued alone. If the consideration paid to the former inures to bind the latter, can there be any good reason why a want or failure of that consideration should not inure to his benefit? We can discover no more reason why the defense in the present case should not inure to the benefit of both defendants than if it had been a defense by way of payment, want [574] or failure of consideration for the note, or fraud in the sale for which the note was given. It prevents circuity of action, and accomplishes full justice to all the parties without the violation of any rule of law."

In New York<sup>1</sup> this defense in a precisely similar case, except that the action was brought against an accommodation indorser alone, was excluded. Selden, J., said: "If we regard such defenses as resting upon a failure of consideration of the contract on which the plaintiff's action is founded, then, unquestionably, the defendant could avail himself of a breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct causes of action one against the other then it is clear . . . that this defendant cannot avail himself of such defense." After remarking that there is no general concurrence of opinion, whether the reduc-

<sup>1</sup> Gillespie v. Torrance, 25 N. Y. 306, N. Y. 19; Thalheimer v. Crow, 13 affirmed in Lasher v. Williamson, 55 Colo. 397; Coffin v. McLean, 80 N. Y. N. Y. 618. See Springer v. Dwyer, 50 560; Harris v. Rivers, 53 Ind. 216.

tion of the plaintiff's claim by recoupment rests upon partial failure of consideration or upon the setting off of distinct claims against each other,<sup>1</sup> he continued: "A careful consideration of the subject, I think, must lead to the conclusion that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. . . . In ordinary cases of breach of warranty . . . both contracts remain binding to their full extent; and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The 'cross-claims arising out of the same transaction compensate one another and the balance only is recovered.' It has always been optional . . . since the doctrine of recoupment has gained a foothold in the courts with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup, he could not . . . have a balance certified in his favor, nor could he maintain a subsequent action for such balance." He remarked that under the code of procedure a balance might doubtless be recovered, but that the right of election to set up a counter-claim in defense or to bring a cross-action still exists; and added that "it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which . . . [the principal] . . . may have against the plaintiff on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and, not being due to the defendant, cannot be claimed by him.<sup>2</sup> 2. . . . [The principal] has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note

<sup>1</sup> Citing *McAllister v. Reab*, 4 Wend. 483 *et seq.*; *S. C. in error*, 8 id. 109; *Batterman v. Pierce*, 3 Hill, 171, 177; *Barber v. Rose*, id. 73; *Basten v. Butler*, 7 East, 479; *Withers v. Greene*, 9 How. (U. S.) 213.

*Ives v. Van Epps*, 22 Wend. 155; *Nichols v. Dusenbury*, 2 N. Y. 286; *Van Epps v. Harrison*, 5 Hill, 66; <sup>2</sup> Code, § 150; *Lemon v. Trull*, 13 How. Pr. 248; 16 id. 576, note.

or reserved for a cross-action. The defendant cannot make the election for him. 3. If the defendant has a right to set up the counter-claim and have it allowed in this action, it must bar any future action by [the principal] for the breach of warranty; and as no balance could be found in the defendant's favor he might thus bar a large claim in canceling a small one. . . . 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of [the principal], and all to remain unpaid, each of the indorsers would have the same rights as the defendants. If they were to set up the same defense, how would the conflicting claims be reconciled?" If the principal and his surety are sued jointly a right of recoupment established by the former inures to the latter's benefit.<sup>1</sup>

It is a general rule of equity that a surety who is jointly bound with his principal may, independently of statute, offset against a suit for joint indebtedness his individual claim against the creditor where both he and the principal are insolvent.<sup>2</sup>

## SECTION 2.

### SURETY'S REMEDIES FOR INDEMNITY.

§ 745. **Action against principal for money paid.** It [576] is an equitable principle of very general application that where one person is a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was, in fact, the principal debtor. And when courts of law a long time since fell in love with a part of the jurisdiction of the court of chancery and substituted the equitable remedy of an action of *assumpsit* upon the common money counts for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money

<sup>1</sup> Springer v. Dwyer, 50 N. Y. 19. Md. 217; Wulschner v. Sells, 87 Ind.

<sup>2</sup> Clark v. Sullivan, 49 N. W. Rep. 75; Brewer v. Norcross, 17 N. J. Eq. 416 (North Dak.); Merwin v. Austin, 219; Rothschild v. Mack, 42 Hun, 75; 52 Conn. 22; Levy v. Steinbach, 43 Davidson v. Alfaro, 80 N. Y. 660.



for the principal debtor, to recover it from the person who ought to have paid it in this equitable action of *assumpsit* as for money paid, laid out and expended for his use and benefit.<sup>1</sup> The law implies a promise by the principal to the surety to indemnify him by refunding all sums of money he may have to pay as such surety. There exists in the surety an equity from the time of his assuming that relation, but no perfect right of action accrues until actual payment.<sup>2</sup> But if there is an express agreement of indemnity made by the principal the surety must rely upon it; none is implied.<sup>3</sup>

[577] § 746. **Who is the principal.** The surety can maintain an action only against his principal and one whose legal liability is discharged. The law does not imply a promise by other persons who may be benefited by the payment.<sup>4</sup> There was accepted for the United States the individual bond of one of several partners for duties due from the firm. In this bond a surety was bound; and, having been compelled to pay, it was held that only the partner who was principal therein was liable to indemnify him. When the surety paid the money he discharged only the obligation in that bond; and the principal who executed the bond, and who was relieved by the payment, was alone liable to reimburse him.<sup>5</sup> Kent, C. J., said: "There is no privity between the parties but what arises from the bond. It would be refining upon the doctrine of implied *assumpsits*, and going beyond every case, to consider the surety in a bond as having, by that act, a remedy at law against other persons for whom the principal in the bond may have acted as trustee. . . . The principal here was, as is stated, a surety for the debt of his firm; and that debt might perhaps have arisen by their being sureties for other persons

<sup>1</sup> Hunt v. Amidon, 4 Hill, 345; Exall v. Partridge, 8 T. R. 308; Toussaint v. Martinnant, 2 id. 105; Taylor v. Mills, 2 Cowp. 525; Preslar v. Stallworth, 37 Ala. 402.

<sup>2</sup> Barney v. Grover, 28 Vt. 391; Sargent v. Salmon, 27 Me. 539; Choteau v. Jones, 11 Ill. 300; Rice v. Southgate, 16 Gray, 142; Konitzky v. Meyer, 49 N. Y. 571; Ward v. Henry, 5 Conn. 595; Collins v. Boyd,

14 Ala. 505; Thompson v. Wilson, 13 La. 138.

<sup>3</sup> Toussaint v. Martinnant, 2 T. R. 105; Wesley Church v. Moore, 10 Pa. St. 273.

<sup>4</sup> Tom v. Goodrich, 2 Johns. 213; Sluby v. Champlin, 4 id. 460; Marsh v. Hayford, 80 Me. 97. See Russell v. Annable, 100 Mass. 72.

<sup>5</sup> Tom v. Goodrich, *supra*.

still behind them. We can only look to the principal and surety in the bond, . . . and to the obligations resulting from that relation because the money was paid by the plaintiff in discharge of that bond and in exoneration of the personal representatives of . . . [the principal], who alone were legally responsible for the debt." But in an Ohio case, a Virginia case, and two Kentucky cases,<sup>1</sup> a different, and, as it appears to the writer, a sounder doctrine, is advanced. In the former case one partner put the firm name to a note under seal; it was held that it should be presumed, in the absence of proof to the contrary, that it was given for a consideration received or to be received by the firm, and was intended and understood to bind it; that the seal was added in mere ignorance of the effect of so doing; and that, although the instrument must at law be considered as the deed of the partner only who sealed it, there being no proof of the assent of the other parties, yet, in equity, the firm became liable; and that consequently were there no evidence of the contract of surety- [578] ship other than that afforded by the instrument itself, and that the plaintiff executed it as surety, the presumption would be that he was surety, not of the principal in the note alone, but of the firm; that whether the firm was or was not bound to the obligee, yet the fair presumption from the testimony was that the surety became such at the request of the partner who signed the note, professing to act for and in behalf of the firm; and that his request under such circumstances, and in the absence of all proof that he alone was bound, was in law the request of the firm; and the relation of principal and surety was thereby created between them.<sup>2</sup> And it was also held that, though the liability of the other partners was merged at law, it was otherwise in equity, and therefore they were bound to indemnify the surety.<sup>3</sup>

When one of two sureties becomes such at the request of his

<sup>1</sup> *Purviance v. Sutherland*, 2 Ohio St. 478; *Burns v. Parish*, 3 B. Mon. 8; *v. Hanner*, 5 Jones, 360; *Neal v. Lea*, 64 N. C. 678.

*Weaver v. Tapscott*, 9 Leigh (Va.), 424; *Hikes v. Crawford*, 4 Bush, 19. <sup>3</sup> See *James v. Bostwick*, Wright (Ohio), 141; *Burns v. Parish*, 3 B. Mon. 8; *Hikes v. Crawford*, 4 Bush, 19.

<sup>2</sup> See *Wharton v. Woodburn*, 4 Dev. & Bat. 507; approved in *Hurdle*

co-surety, and upon his promise that he would be put to no loss, he may recover the whole of what he may have been compelled to pay from the co-surety; such promise may be shown by parol; it is not within the statute of frauds.<sup>1</sup>

§ 747. **When right of action accrues.** Ordinarily, where a principal has made default in the payment of the debt or performance of the contract, the surety need not wait for a suit to be brought, but may pay and discharge the debt as soon as the liability arises. Nor is it necessary to obtain leave of the principal; the law implies a request to the surety to do this in behalf of the principal, and he may maintain an action for it.<sup>2</sup> The right exists immediately in favor of a surety when he has paid the debt, or any part of it, if it was due.<sup>3</sup> He may maintain *assumpsit* after he has paid it, as for money [579] paid at the principal's request.<sup>4</sup> When he pays the debt in instalments, he is entitled to sue his principal for each instalment as soon as it is paid.<sup>5</sup> Without his special request the surety may pay the debt before it is due;<sup>6</sup> and after, but not before, sue for the money thus paid.<sup>7</sup> But the surety must be legally required to pay. It seems he is not bound to set up the statute of limitations where it has not run against the principal.<sup>8</sup> In *Norton v. Hall*<sup>9</sup> a note was made by H., payable to F., and indorsed by the plaintiff as surety for the accommodation of both H. and F. When it fell due the plaintiff, not being able to pay it, at the request of the creditor, gave additional security by mortgage, which the creditor held until the plaintiff paid the note, more than six years after it became due. It was held that H. having failed to pay when due, the

<sup>1</sup> *Preslar v. Stallworth*, 37 Ala. 402.

<sup>2</sup> *Teberg v. Swenson*, 32 Kan. 224; *Hazleton v. Valentine*, 113 Mass. 472.

<sup>3</sup> *Ritenour v. Mathews*, 42 Ind. 7.

<sup>4</sup> *Davis v. Humphreys*, 6 M. & W. 153; *Ford v. Keith*, 1 Mass. 139; *Warrington v. Farbor*, 8 East, 242.

<sup>5</sup> *Weiler v. Henarie*, 15 Ore. 28; *Williams v. Williams*, 5 Ohio, 444; *Bullock v. Campbell*, 9 Gill, 182; *Davis v. Humphreys*, 6 M. & W. 153; *Hall v. Hall*, 10 Humph. 352.

<sup>6</sup> *Craig v. Craig*, 5 Rawle, 91; *White v. Miller*, 47 Ind. 385. If the principal

is not damaged thereby, as by being prevented from carrying out a compromise he has made with his creditors. *Barber v. Gillson*, 18 Nev. 89.

<sup>7</sup> *Id.*; *Dennison v. Soper*, 33 Iowa, 183; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424.

<sup>8</sup> *Shaw v. Loud*, 12 Mass. 447; *Holinsbee v. Ritchey*, 49 Ind. 261. But see *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Hatchett v. Pegram*, 21 La. Ann. 722; also *Houck v. Graham*, § 000, *infra*.

<sup>9</sup> 41 Vt. 471.

plaintiff had a right to make this arrangement for time with the creditor; that H. could not avail himself of the statute of limitations as a defense to a suit by the plaintiff, brought within six years from the time he paid the note. When the liability of the surety has been in good faith continued for more than six years from the time the note became due, and payment is made by him, such continued liability carries with it the relation of principal and surety, and the liability of the principal to reimburse the surety for the money so paid by him.

§ 748. **Measure of recovery.** The implied undertaking or promise of the principal is one of indemnity; the surety has no right of action merely because the debt is not paid by the principal when due; nor until he has paid it or procured the discharge of the principal by assuming it himself.<sup>1</sup> Nor can the surety recover any more than he has paid and in- [580] terest thereon;<sup>2</sup> if he pays in a depreciated currency, as confederate notes, he can recover from his principal only the market value of the payment at the time it was made, even though they were taken by the creditor at par.<sup>3</sup>

<sup>1</sup> *Ingalls v. Dennett*, 6 Me. 79; *Clark v. Foxcroft*, 7 id. 348; *Powell v. Smith*, 8 Johns. 249; *Shepard v. Shepard*, 6 Conn. 37; *Hearne v. Keath*, 63 Mo. 84; *Hoyt v. Wilkinson*, 10 Pick. 31; *Pigou v. French*, 1 Wash. C. C. 278; *Elwood v. Deifendorf*, 5 Barb. 398; *Reynolds v. Magness*, 2 Ired. 26; *Gillespie v. Creswell*, 12 Gill & J. 36; *Thompson v. Richards*, 14 Mich. 172; *Butler v. Ladue*, 12 id. 173; *Hall v. Nash*, 10 id. 303; *Paul v. Jones*, 1 T. K. 599; *Rodman v. Hedden*, 10 Wend. 498; *Taylor v. Mills*, 2 Cowp. 525; *Kraft v. Fancher*, 44 Md. 204; *Delaware, etc. Iron Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Matthews v. Hall*, 21 W. Va. 510; *Tyree v. Parham's Ex'r*, 66 Ala. 424.

<sup>2</sup> *Martindale v. Brock*, 41 Md. 571; *Eaton v. Lambert*, 1 Neb. 339; *Bonney v. Seeley*, 2 Wend. 481; *Robinson v. Sherman*, 2 Gratt. 178; *Hicks v. Bailey*, 16 Tex. 229; *Miles v. Bacon*,

4 J. J. Marsh. 451; *Snyder v. Blair*, 33 N. J. Eq. 208; *Hill's Estate*, 67 Cal. 238; *Waldrip v. Black*, 74 id. 409.

It is held in *Carpenter v. Minter*, 72 Texas, 370, that where a note is paid by a surety he may recover from its maker the same amount as the payee could; if the latter could have recovered attorneys' fees so may the former, although they were payable only in case suit should be brought, and the surety paid voluntarily. Compare *Acers v. Curtis*, 68 id. 423, stated in § 000. The contrary is held in Indiana, and for better reasons. *Gieseke v. Johnson*, 115 Ind. 308.

<sup>3</sup> *Feamster v. Withrow*, 9 W. Va. 296; *Butler v. Butler*, id. 674; *Jordan v. Adams*, 7 Ark. 348; *Kendrick v. Forney*, 22 Gratt. 748; *Edmunds v. Sheahan*, 47 Tex. 443; *Gillespie v. Creswell*, 12 Gill & J. 36; *Miles v.*



A payment made by a surety in compromise of his supposed liability upon a disputed claim against him and his principal may be recovered if there was no actual liability, and the principal has or is entitled to the benefit of the payment in discharge of the original claim against him.<sup>1</sup> He can only recover to the amount he has paid where he compounds a debt; and such will be the effect though he goes through the form of purchasing the demand and has it assigned to him. His relation of surety precludes him from speculating at the expense of his principal.<sup>2</sup>

Bacon, 4 J. J. Marsh. 457; Crozier v. Grayson, id. 514.

In Southall v. Farish, 85 Va. 403, an insolvent bank held judgments against a principal and his surety, and deposits of the latter worth sixty per cent. of their face value. These a third party contracted to take at par. The surety paid the judgments with his deposits under an agreement with the principal to pay their full value, which the former recovered.

<sup>1</sup> Bancroft v. Dwinnell, 27 Vt. 668.

<sup>2</sup> Reed v. Norris, 2 Mylne & Cr. 361; Eaton v. Lambert, 1 Neb. 339; Coggeshall v. Ruggles, 62 Ill. 401; Pickett v. Bates, 3 La. Ann. 627; Crozier v. Grayson, 4 J. J. Marsh. 514. But see Blow v. Maynard, 2 Leigh, 29.

In Reed v. Norris, *supra*, a surety's representatives made an arrangement with the creditor's executors by which the debt for which the surety was bound with the principal was got rid of and discharged, and the question was whether the representatives of the surety's estate were entitled to demand more than they had actually paid, they having purchased the demand and taken an assignment. The lord chancellor said: "Now, if there had been no precedent on this subject, I should have found very little difficulty in making

a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation, and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract of indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of

If the contract be tainted with usury, and the surety [581] has knowledge of it, and pays the usury, it has been held that he cannot recover from the principal beyond what the creditor could have recovered.<sup>1</sup> Where, however, the creditor has recovered against the principal and surety a judgment which the surety has paid, the fact that part of the judgment is for usury will not avail the principal as a defense when sued by the surety for indemnity.<sup>2</sup> And this is so though the judgment be confessed by the principal and surety.<sup>3</sup> So where a note tainted with usury was signed by a surety who was then ignorant of that fact, and who paid it after he had knowledge of it, he was held entitled to recover unless he had been notified by the principal not to pay it. The court said no man is *bound* to take advantage of a penal law, and avoid a con-

his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and instead of treating that settlement as a payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount; thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?" *Ex parte Rushforth*, 10 Ves. 420; *Butcher v. Churchill*, 14 id. 567; *Coggeshall v. Ruggles*, 62 Ill. 401; *Eaton v. Lambert*, 1 Neb. 339.

In *Flower v. Strickland*, 107 Mass. 552, B. indorsed A.'s promissory note, payable on time to B.'s order, for A.'s accommodation; and A. negotiated it to C. for its full amount. At the maturity of the note B., having been informed by A. that he could not pay it, took it up, paying C. therefor half of the amount thereof. It was held that B. could recover the full amount

of the note of A. in an action upon the note as payee. The court said the plaintiff had the same right as any other person to purchase the note from the holder for such price as might be agreed on between them. If he purchased the entire interest of the holder in the note, he might recover the whole amount to his own use. Gray, J., said: "The defendants having received the whole amount of the note at the time of its original negotiation, and being now no longer liable to any action by . . . [the holder, to whom plaintiff paid it], the amount of their liability in this action against them as makers of the note is not affected by the question how much the plaintiff paid to . . . [the holder], or whether the sum recovered will belong to . . . [such holder], or to the plaintiff." *Pinney v. McGregory*, 102 Mass. 186. *Contra*, *Pace v. Robertson*, 65 N. C. 550; *Burton v. Slaughter*, 26 Gratt. 920.

<sup>1</sup> *Jones v. Joyner*, 8 Ga. 562; *Mims v. McDowell*, 4 Ga. 182.

<sup>2</sup> *Wade v. Green*, 3 Humph. 547.

<sup>3</sup> *Thurston v. Prentiss*, 1 Mich. 193.

tract which he ought in equity to perform.<sup>1</sup> But a surety who pays usurious interest to obtain time to pay his principal's debt cannot collect such excessive interest.<sup>2</sup> A surety joined with his principal in making a note bearing eight per cent. interest. One of the sureties died before maturity of the note. By a statute of Kentucky it was provided that "after the death of the payer or obligor of a contract for the loan or forbearance of money at a higher rate of interest than six per cent. per annum, such contract, after maturity, and any judgment rendered thereon, shall bear six per cent. per annum." Judgment had been obtained against the surety and surviving partner for the amount of the note at the stipulated rate of interest, which the surety paid, and then sought indemnity from the estate of the deceased partner. He insisted that inasmuch as he was compelled to pay a greater rate of interest on account of his contract of suretyship, the law [583] would imply a promise on the part of the representative of his principal to indemnify him. But the court said: "To recognize this claim would be to defeat the operation of a plain and unmistakable provision of the act under which the original contract was entered into. The supposed hardship which it is insisted will result from a refusal to recognize it has no substantial existence. It is the duty of the surety to

<sup>1</sup> *Ford v. Keith*, 1 Mass. 139. The principal cannot plead usury in defense of a mortgage given his surety as indemnity, the latter not being privy to the usurious contract. *Turman v. Looper*, 42 Ark. 500.

<sup>2</sup> *Thurston v. Prentiss*, 1 Mich. 193; *Lucking v. Gegg*, 12 Bush, 298.

In *Thurston v. Prentiss*, *supra*, a usurious loan was made by the principal, the usury being deducted from the loan. Judgments were confessed by the principal and a surety for the amount of the loan, including the usury, and another surety became security for stay of execution until the period of credit expired. The sureties paid the judgments to the creditor. In a suit by the principal debtor against the sureties, to be re-

lieved from an indemnifying security to them, the court said: "Appellant (the plaintiff) did not interfere to protect them (the sureties) from paying either the amount actually loaned, or the usurious portion of it, and they were not bound to litigate the matter with . . . (the creditor) to get rid of the usury. Appellant might have done so, and he was the only person interested in reducing the amount to be paid; but he neglected to interfere for the protection of his sureties, and . . . (one of them) was liable to have the judgment enforced against him. By his paying the whole, including the usury, the appellant became bound to refund, or allow the same amount in settlement with him."

pay the debt at the maturity of the note.<sup>1</sup> If he had done this he would have stopped the accrual of interest against himself; and he would have been entitled to legal interest against the principal's estate on the sum paid for its benefit. He accepted indulgence from the common creditor with notice of the fact that the estate of the deceased debtor could not be required to pay a greater rate of interest than six per cent. per annum. He paid the additional interest for the indulgence extended to himself, and not for the use and benefit of . . . [his principal's] estate."<sup>2</sup>

If there are several principals the surety may proceed against each of them for the recovery of the whole amount he has paid. "Each of the principals is debtor of the whole debt in favor of the creditor, and the person being surety for each of them has, by paying the debt, liberated each of them from the whole, and consequently has a right to conclude *in solido* against each of them for the reimbursement of the whole of what he has paid, with interest from the day of the demand. This rule prevails in both civil and common law."<sup>3</sup> It is an exception to the rule requiring all persons interested in the subject-matter to be joined in a suit in favor of sureties, that one of several of them who has paid a joint debt may proceed against the principal without joining his co-sureties.<sup>4</sup>

**§ 749. Surety may compel debtor to pay.** It is an established rule of equity that when a debt falls due from a principal debtor the surety is entitled to compel him to pay it. This right may be exercised although the surety has not been disturbed. So long as the debt for which he is bound remains there is a cloud hanging over him which equity will remove

<sup>1</sup> This is probably incorrect. A surety does not owe to his principal the duty to pay the debt at maturity. He is bound to the creditor to do so, but the law cannot be said to impose that duty on the surety as one he owes to his principal, who, in case of such payment, is instantly under obligation to reimburse him. But under the statute of Kentucky, the estate of the principal could not be charged with interest beyond six per cent. after the maturity of the debt;

the surety was bound to take notice of that statutory regulation. He could have saved himself from loss by paying at once when the debt became due, and he subjected himself to the greater rate by voluntarily delaying payment.

<sup>2</sup> *Lucking v. Gegg*, 12 Bush, 298.

<sup>3</sup> *Apgar's Adm'r v. Hiler*, 24 N. J. L. 812; *Overton v. Woodson*, 17 Mo. 453; *Clay v. Severance*, 54 Vt. 300.

<sup>4</sup> *Dodd v. Wilson*, 4 Dela. Ch. 108. See *Madox v. Jackson*, 3 Atk. 404.



by a proceeding in the nature of a bill *quia timet*.<sup>1</sup> It was assumed in New York that a surety may always avail himself of this remedy after the debt has become due,<sup>2</sup> but it is now settled in that state that "there must be some specific equity beyond the mere relation of surety and creditor to entitle the surety to this relief."<sup>3</sup> If a surety holds a mortgage given him by the principal as indemnity he may have foreclosure of it after the debt has become due, although he has not paid it.<sup>4</sup> The foreclosure may be for the whole amount of the principal's liability, although the creditor's judgment against him is for a less sum.<sup>5</sup>

§ 750. **Payment giving right to reimbursement.** The usual remedy at common law has been an action of *assumpsit* for money paid to the defendant's use, though sometimes the action has been special. When it is for money paid a technical question may be raised whether the particular mode of payment will sustain that form of action. The more important inquiry is, what is payment which will entitle the surety to immediate recourse to the principal; and when made otherwise than in money, what is the measure of the surety's recovery against him.

It has been loosely said in a Vermont case that if a surety in any way extinguishes or pays the debt of the principal, it is, as far as the latter is concerned, equivalent to paying money [584] for his benefit and at his request; and the surety can maintain general *assumpsit* against him for money paid.<sup>6</sup> An extinguishment of the debt by the creditor at the request of the surety without actual payment in any form would cer-

<sup>1</sup> Norton v. Reid, 11 S. C. 593; Antrobus v. Smith, 3 Meriv. 569; Pride v. Boyce, Rice Eq. 386; King v. Baldwin, 2 Johns. Ch. 554; Ranelagh v. Hayes, 1 Vern. 189; Irick v. Black, 17 N. J. Eq. 189; Delaware, etc. Iron Co. v. Oxford Iron Co., 38 id. 151; Moore v. Topliff, 107 Ill. 241; Keokuk v. Love, 31 Iowa, 199; Harris v. Newell, 42 Wis. 687; Hayden v. Thrasher, 18 Fla. 795.

<sup>2</sup> King v. Baldwin, 17 Johns. 386.

<sup>3</sup> Marsh v. Pike, 1 Sandf. Ch. 210; S. C., 10 Paige, 595; Hayes v. Ward,

4 Johns. Ch. 131; Newcomb v. Hale, 90 N. Y. 326, 330; In re Babcock, 3 Story, 393; Wright v. Nutt, 3 Brown Ch. 326; Story's Eq., § 327.

<sup>4</sup> McDaniel v. Austin, 11 S. E. Rep. 350; S. C., 32 S. C. 601; Bodkin v. Merit, 86 Ind. 560 (if the debt has come into judgment against the principal and surety and the former has no other property).

<sup>5</sup> Hellams v. Abercrombie, 15 S. C. 110.

<sup>6</sup> Hullett v. Soullard, 26 Vt. 295.

tainly not be equivalent to payment by the debtor in money. He is entitled to recover the amount paid, not the amount extinguished.<sup>1</sup> The voluntary payment of the debt in property, real or personal, transferred to the creditor and received by him as payment;<sup>2</sup> or the seizure and sale of the surety's property at the instance of the creditor under execution will entitle the surety to maintain an action for money paid against his principal.<sup>3</sup> In such cases the value of the property at the date of the sale is properly the measure of damages, if it does not exceed the amount due in money to the creditor.<sup>4</sup> Payment of the principal's debt by a stranger, if the latter has been reimbursed by the surety, gives him a right of action.<sup>5</sup> If the surety surrenders notes executed by his principal he is entitled to recover their full value regardless of the solvency of their maker.<sup>6</sup> If he pays when there is no legal duty upon him to do so he cannot claim reimbursement from his principal, nor contribution from a co-surety.<sup>7</sup> Where a creditor receives the negotiable paper of the surety as full and absolute payment and satisfaction of the debt of the principal, and not as conditional payment or collateral security, the surety may, without having first paid it, recover its amount of the principal.<sup>8</sup> But he does not become entitled to sue his principal upon the ground of his having discharged the indebtedness to

<sup>1</sup> Bonney v. Seely, 2 Wend. 481.

<sup>2</sup> Ainslie v. Wilson, 7 Cow. 668; Randall v. Rich, 11 Mass. 494; Bonney v. Seely, 2 Wend. 481.

<sup>3</sup> Lord v. Staples, 23 N. H. 448.

<sup>4</sup> Bonney v. Seely, 2 Wend. 481; Atherton v. Williams, 19 id. 105; Jones v. Bradford, 25 Ind. 305.

In Coleman v. Riggs, 61 Iowa, 543, a surety on a stay bond was adjudged bankrupt, and his property sold to satisfy a judgment. The assignee regarded as worthless the claim against the judgment debtor, and its enforcement became barred by the statute. It was held that the surety might maintain an action against his principal; the measure of his recovery being the amount paid, not the value of the property sold.

<sup>5</sup> Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751.

<sup>6</sup> Barber v. Gillson, 18 Nev. 89.

<sup>7</sup> Kimble v. Cummins, 3 Met. (Ky.) 327; Spillman v. Duff, 15 B. Mon. 134; Dawson v. Lee, 83 Ky. 49; Stone v. Hammell, 83 Cal. 547.

<sup>8</sup> Witherby v. Mann, 11 Johns. 518; Ripley v. Moseley, 57 Me. 76; Anthony v. Percifull, 8 Ark. 494; Little v. Little, 13 Pick. 426; Day v. Stickney, 14 Allen, 255; Pearson v. Parker, 3 N. H. 366; Rodman v. Hedden, 10 Wend. 498; Lee v. Clark, 1 Hill, 56; Cornwall v. Gould, 4 Pick. 444; Doolittle v. Dwight, 2 Met. 561; Douglass v. Moody, 9 Mass. 548; Peters v. Barnhill, 1 Hill L. (S. C.) 234; Hearne v. Keath, 63 Mo. 84; Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Elwood v.

the creditor by giving his own absolute obligation in payment thereof, so long as anything whatever remains to be done between him and the creditor to carry the engagement between them completely into effect.<sup>1</sup> When the surety has assumed the debt in other forms he has been allowed to recover of the principal without otherwise paying it; as where he has secured it by mortgage and the principal has been released;<sup>2</sup> where he has replevied a judgment, and thereby discharged it.<sup>3</sup> The surety on an administrator's bond, after a breach, was appointed administrator in place of his principal; and as such indorsed on the bond a receipt of money from himself for which his principal was in default, and included it in the inventory of assets in his hands; and it was held that an action would lie immediately by him against the principal for the amount so recognized as paid to his use.<sup>4</sup>

In England it has been held that where a surety procured a discharge of the obligation of his principal by giving his own bond for the debt he could not, thereupon, before paying the bond, maintain an action against his principal for money paid.<sup>5</sup> Lord Ellenborough, C. J., said: "There is no pretense for considering the giving of this new security as so much money paid for the defendant's use." He added, apparently in deference to a previous case:<sup>6</sup> "Supposing even the case of the note or bill of exchange, as the current representative of money, to have been rightly decided; still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." A similar decision was

Deifendorf, 5 Barb. 398; Bonney v. 346; Stone v. Hammell, 83 Cal. 547; Seely, 2 Wend. 481; Van Ostrand v. Brisendine v. Martin, 1 Ired. L. 286; Reed, 1 id. 424; In re Morrill, 2 Sawyer, 356; Bone v. Torry, 16 Ark. 83; Nowland v. Martin, id. 307; Lynch v. Hancock, 14 S. C. 66.

Neale v. Newland, 4 Ark. 506; Mims v. McDowell, 4 Ga. 182; Lyon v. Northrop, 17 Iowa, 314; Barclay v. Gooch, 2 Esp. 571; Houston v. Fellows, 27 Vt. 634; Stubbins v. Mitchell, 82 Ky. 535; Bowers v. Cobb, 31 Fed. Rep. 678; Sapp v. Underwood, 68 Iowa, 699; Rizer v. Cullen, 27 Kan. 339. Compare White v. Miller, 47 Ind. 385; Romine v. Romine, 59 id.

346; Stone v. Hammell, 83 Cal. 547; Brisendine v. Martin, 1 Ired. L. 286; Nowland v. Martin, id. 307; Lynch v. Hancock, 14 S. C. 66.

<sup>1</sup> Bank of Monroe v. Gifford, 79 Iowa, 300; Hearne v. Keath, 63 Mo. 84.

<sup>2</sup> McVicar v. Royce, 17 Up. Can. Q. B. 529.

<sup>3</sup> Burns v. Parish, 3 B. Mon. 8.

<sup>4</sup> Hazelton v. Valentine, 113 Mass. 472.

<sup>5</sup> Taylor v. Higgins, 3 East, 169.

<sup>6</sup> Barclay v. Gooch, 2 Esp. 571.

made in a later case.<sup>1</sup> One of the makers of a joint and several note, after the same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was paid on the bond, and it was held that until payment made upon it he could not maintain an action for money paid in order to recover contribution from any of the other makers of the note. Bayley and Abbott, JJ., were at first inclined in favor of recovery on the ground that the court might properly consider the extinguishment of the debt as equivalent to money paid for the defendant's use; that on that ground the bond was given as money and [586] the defendant had the benefit of it as money; but on considering the circumstances, and the previous case of *Taylor v. Higgins*, they finally decided that the action was not maintainable. Bayley, J., said: "The plaintiff in this case has paid no money. It is said, indeed, that he has given what is equivalent to it, and that it ought to be considered for this purpose as money; so it was held in *Barclay v. Gooch*.<sup>2</sup> But in *Taylor v. Higgins* the court, having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events, conflicting authorities on the point, the last of which is in favor of the defendant. In *Taylor v. Higgins* the old bond was delivered up, and the new one accepted as payment and satisfaction of the old debt. . . . Then, as the authorities differ, it becomes necessary to look at the reason of the thing. No money has yet come out of the plaintiff's pocket; *non constat* that any ever will; for if he recovers from the defendant in the present action, still it is possible that he may never pay it to [the creditor]. Then the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond he may then have his remedy against Jameson for his contribution." The whole court seem to have proceeded upon the authority of *Taylor v. Higgins*, and the reason given by the court which decided that case. Holroyd, J., said: "In order to support this action the debt must have been extinguished by an actual or virtual payment of money by the

<sup>1</sup> *Maxwell v. Jameson*, 2 B. & Ald.      <sup>2</sup> 1 Esp. 571.



plaintiff to the defendant's use. There has clearly been no actual payment; and in order to have made the giving of the bond operate as a virtual payment the defendant must be shown to have been a party to that transaction, which was not the case." The opinions in this case are based on the apparent assumption that the bond of one of the debtors extinguished the old debt as against the other; but Abbott, J., said, incidentally, it was doubtful. It was held in *White v. Cuyler*<sup>1</sup> that where a wife and a surety entered into a covenant with the plaintiff, which the wife failed to perform, and [587] suit was brought in *assumpsit* against the husband, that covenant would not lie, for the wife had no authority to bind him by deed; and that the covenant of the surety did not by operation of law extinguish the debt of the principal.

§ 751. **Same subject.** These cases have been supposed to recognize a distinction between negotiable paper given by a surety in payment of the principal's debt and other forms of agreement or obligation for that purpose, based on the idea that negotiable paper is a representative of money, and that a bond is nothing like it. Such a distinction cannot be maintained; neither is money; but each has a money value; and if property may be accepted in lieu of money as a payment, and the discharge of a debt in this manner by a surety will sustain an action for money paid, why should not a payment made by the delivery of a bond, note or other valuable promise to pay money? Several American cases have recognized this distinction, though not uniformly upon the same ground.<sup>2</sup> These, as well as the English cases which they purport to follow, appear to turn on the technical point that payment of the debt by the surety with any new security, other than negotiable paper, will not support the action for *money paid*. Where the plaintiff gave his promissory note for an executory consideration which failed, and the defendant, the payee, sold the note and got his pay for it, but it did not appear how

<sup>1</sup> 6 T. R. 176.

<sup>2</sup> *Petres v. Harmon*, 8 Blackf. 112; *Bennett v. Buchanan*, 3 Ind. 47; *Romine v. Romine*, 59 id. 346; *Campbell v. Jones*, 4 Wend. 306; *Cumming v. Hackley*, 8 Johns. 202; *Boul-*

*ware v. Robinson*, 8 Tex. 327; *Morrison v. Berkey*, 7 S. & R. 238; *Sayre v. King*, 17 W. Va. 562. This distinction is founded upon no apparent good reason. *Stone v. Hammell*, 83 Cal. 547.

or in what form, it was held that the plaintiff's action for money had and received was maintainable. The note was treated as having gone into the hands of an innocent holder, and the proceeds in the defendant's hands were, therefore, money had and received to the plaintiff's use.<sup>1</sup> An insurance broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the [588] company to pay the premium; and then alleged that in consideration of the premises and of such covenant the policy was effected. The broker having become bankrupt without having paid the premium to the company, it was held that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay. This recovery was allowed under a declaration which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies; but it was declared that the plaintiffs were not entitled to recover such sums under the count for money paid because the broker had not actually paid the sums, or done anything which was equivalent to payment. Bayley, J., said: "Then it is necessary to consider in what situation the broker stands in order to ascertain whether he is not entitled to call on the assured for the premiums. The underwriters have a claim upon him for the full amount of the premiums; and if that be so he ought to recover those premiums from those persons who have had the benefit of the policies." Parke, J., said: "He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any recourse to the defendants for the premiums, and in conse-

<sup>1</sup> Colville v. Besly, 2 Denio, 139; Van Ostrand v. Reed, 1 Wend. 424; Chapman v. Shaw, 5 Me. 59.

quence the defendants are liable to pay a sum of money to the plaintiffs.”<sup>1</sup>

§ 752. **Liability of principal for surety's costs.** On the subject of the principal's liability for costs incurred by the surety, it should be borne in mind that as between them it is for the default of the principal that the surety is proceeded against by the creditor. It is not a surety's duty to his principal, but the principal's duty to the surety as well as to the other contracting party, to fulfill the contract by which they are bound. Hence, it is but just that if the surety is sued upon that contract the principal shall be liable to him for the costs [589] which he may have to pay in consequence of such suit; and so the law declares.<sup>2</sup> And this principle applies to accommodation parties to commercial paper,<sup>3</sup> but not between other parties primarily and secondarily liable.<sup>4</sup> If a surety knows that a claim made by a creditor of his principal is just, he has no right to contest a suit brought against him and litigate the same. If he does, and fails, he cannot recover of his principal the costs so incurred. He is only entitled to recover the costs of a judgment by default<sup>5</sup> and the costs of execution. These latter, it has been held, could not be recovered,<sup>6</sup> but it is believed the surety has the same right to costs incurred on an execution as in obtaining judgment; one equally with the other is the expense of the coercive measures of the creditor to make the money in consequence of the principal's default. Redfield, C. J., said: “If, when a surety was sued upon the debt of his principal, and was unable to

<sup>1</sup> Power v. Butcher, 10 B. & C. 329.

<sup>2</sup> Boyd v. Myers, 12 Lea, 175; Bennett v. Dowling, 22 Tex. 660; Apgar v. Hiler, 24 N. J. L. 812; Preslar v. Stallworth, 37 Ala. 403; Hulett v. Soullard, 26 Vt. 295; Wynn v. Brooke, 5 Rawle, 106; McKee v. Campbell, 27 Mich. 497.

<sup>3</sup> Baker v. Martin, 3 Barb. 634; Hubby v. Brown, 16 Johns. 70; Jones v. Brooke, 4 Taunt. 464; Mott v. Hicks, 1 Cow. 513.

<sup>4</sup> Dawson v. Morgan, 9 B. & C. 618; King v. Phillips, Pet. C. C. 350.

<sup>5</sup> Holmes v. Weed, 24 Barb. 546;

Short v. Galloway, 11 Ad. & El. 28.

See Whitworth v. Tilman, 40 Miss. 76; Robinson v. Sherman, 2 Gratt. 178; Redfield v. Haight, 27 Conn. 31.

In Steinhart v. Doellner, 34 N. Y. Super. Ct. 218, it was held that where a surety allowed a suit to go by default without notice to his principal, he should only recover the costs incident to the service of the summons; he should have notified his principal, and thus enabled him to settle without further costs.

<sup>6</sup> Emory v. Vinall, 26 Me. 235.

pay it, and the same went into judgment, and was levied upon his land, he must lose all costs recovered and the expenses of the levy because he did not pay the principal debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered [by the surety of the principal] as money paid, so equally may the costs.”<sup>1</sup> Whether a surety may defend, and thus increase the costs at the expense of his principal, will, as in other cases of recovery over, depend on the reasonableness of his [590] conduct in doing so and the expenditures made.<sup>2</sup> Where he persists in making a defense after being notified by the principal that none exists, and contrary to his express wishes, he does so at his peril.<sup>3</sup>

### § 753. Principal not liable for consequential damages.

In an early Massachusetts case disclosing extraordinary facts, the extent of a surety's redress against the principal was very clearly defined.<sup>4</sup> The plaintiff signed a bond as surety for one of the defendants for the payment of duties at a custom-house in 1814. The British forces took possession of the custom-house and the bond, after which a monition was posted up directing the obligors to appear at Halifax and show cause why they should not be held to pay the bond to the captors; this was followed by the issue of a *capias* against them; the plaintiff fled to avoid the process; he went with his family to Boston and remained for a year or more; he was a merchant of respectable standing and large business; had many debts due him which were probably lost by reason of his absence. There was a written promise of the defendant to save the plaintiff harmless from any loss he might sustain by signing the bond. The court held that all the indemnity which a surety in a bond for the payment of money can claim from the principal is the amount he has paid on account of the bond,

<sup>1</sup> Hulett v. Soullard, 26 Vt. 295; Miss. 76; Cranmer v. McSwords, 26 Norfolk v. American St. Gas Co., W. Va. 412; May v. May, 19 Fla. 373; 108 Mass. 404. Dubois v. Hermann, 56 N. Y. 673;

<sup>2</sup> See vol. 1, § 82; Downer v. Baxter, 30 Vt. 467; Thomson v. Taylor, 11 Hun, 274; Bennett v. Dowling, 22 Tex. 660; Whitworth v. Tilman, 40

Slingerland v. Bennett, 66 id. 611.  
<sup>3</sup> Beckley v. Munson, 22 Conn. 299.  
<sup>4</sup> Hayden v. Cabot, 17 Mass. 169.



with all such reasonable expenses as he may have been obliged to incur; not such extraordinary and remote expenses as might have been prevented by its payment. Parker, C. J., said: "The common construction of such a contract is that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to [591] discharge his own debt. But extraordinary expenses which might have been avoided by payment of the money or remote and unexpected consequences are never considered as coming within the contract. Thus, if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in his business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for his consequential misfortune. It is not the natural and necessary effect of his becoming surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So any loss or expense occasioned by an attempt to avoid payment of an obligation cannot have been contemplated by the parties as a subject of indemnity; the true meaning of the contract being that if the surety pays voluntarily he shall be reimbursed; if he is compelled by suit to pay he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison,<sup>1</sup> or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity, because they might be avoided by payment which he must be considered as stipulating that he was able to make. The indefinite nature and extent of such damages as are claimed in the present action is also a sufficient objection to the character of the action itself. If a surety who flies to avoid payment can recover an indemnity for all the consequences of his flight, such as the loss of business, loss of debts, expenses of removing and supporting

<sup>1</sup> Powell v. Smith, 8 Johns. 249.

his family, the principal would have no means of protecting himself against extravagant claims; so that the danger would rather lie in having a surety than in becoming one, which has heretofore been thought to be attended with the most hazard."<sup>1</sup>

§ 754. **Contribution between co-sureties.** The right of one surety to call upon his co-surety for contribution arises from a principle of equity growing out of the relation which the parties have assumed towards each other. It has been supposed not to result from any implied contract between [592] them, but to be based upon an acknowledged principle of natural justice which requires that those who voluntarily assume a common burden should bear it in equal proportions.<sup>2</sup> This equity attaches when the relation commences, and may at once be invoked when one surety has been compelled to pay the debt,<sup>3</sup> or has paid it without compulsion;<sup>4</sup> but not before.<sup>5</sup> It is a right, however, now recognized and enforced at law, because the equitable principle has been so long and so generally acknowledged and applied that persons in placing themselves under circumstances to which it applies may be supposed to act under contract implied from the universality of that principle.<sup>6</sup> By becoming sureties each impliedly promises the others, in contemplation of law, that he will faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal;<sup>7</sup> in other

<sup>1</sup> Vance v. Lancaster, 3 Hayw. (Tenn.) 130.

<sup>2</sup> Liddell v. Wiswell, 59 Vt. 365; Deering v. Earl of Winchelsea, 1 Cox, 318; Wayland v. Tucker, 4 Gratt. 267; White v. Banks, 21 Ala. 705; Russell v. Faylor, 1 Ohio St. 327; Dent v. King, 1 Ga. 200; Warner v. Morrison, 3 Allen, 566; Camp v. Bostwick, 20 Ohio St. 337; Roberts v. Adams, 6 Porter, 361; Wells v. Miller, 66 N. Y. 255. Hence the obligations growing out of the relation are not affected by the discharge in bankruptcy of one surety when his co-surety made the payment subse-

quent to such discharge. Liddell v. Wiswell, 59 Vt. 365.

<sup>3</sup> Wayland v. Tucker, 4 Gratt. 267. Contribution may be compelled without proof of a request from co-obligors or any of them to pay. Hoyt v. Tuthill, 33 Hun, 196.

<sup>4</sup> Mason v. Pierron, 69 Wis. 585.

<sup>5</sup> Gourdin v. Trenholm, 25 S. C. 362, 377.

<sup>6</sup> Lansdale v. Cox, 7 T. B. Mon. 401; Bachelder v. Fiske, 17 Mass. 464; Norton v. Coons, 6 N. Y. 33; Agnew v. Bell, 4 Watts, 31; Craythorne v. Swinburn, 14 Ves. 160; Paulin v. Kaighn, 29 N. J. L. 480.

<sup>7</sup> Hickborn v. Fletcher, 66 Me. 209.

words, that he will pay his proportion of the debt if the principal neglects to pay it, or will save his co-surety harmless from injury by being obliged, through the former's neglect, to pay more than his proper proportion of it. This obligation does not arise solely out of the consideration that the surety so liable has been relieved of a burden, but also from the consideration that he engaged to indemnify his co-surety against loss arising from neglect to pay his own share in case of the principal's delinquency.<sup>1</sup> It is on this theory of the relation of sureties to each other that the estate of a deceased surety is usually bound to contribute to the discharge of a liability which occurred subsequent to his death.<sup>2</sup>

§ 755. **Who are co-sureties.** All sureties of the same principal in respect to the same debt or liability are not co-sureties. It is not sufficient that both parties are sureties; they must occupy the same position in respect to the principal, and without equities between themselves giving advantage to one over the other.<sup>3</sup> A surety in a note cannot claim contribution from an indorser as such,<sup>4</sup> but proof, and even parol [593] proof, is admissible to show that they are co-sureties.<sup>5</sup> Where one indorses a note before it is issued he is *prima facie* a guarantor, and may treat all the makers as principals for his indemnity, though he knew a part were sureties; the actual relation of such indorser to other parties may be shown by parol.<sup>6</sup> So it may be shown that though two persons signed the same obligation as sureties for a third, one of them did so at the request of the principal, and the other as surety of the first surety, and thus that they are not co-sureties as between themselves. In that case the first surety stands in the rela-

<sup>1</sup> Crosby v. Wyatt, 23 Me. 156; <sup>3</sup> Rosenbaum v. Goodman, 78 Va. Howe v. Ward, 4 id. 195; Bradley v. 121; Moore v. Moore, 4 Hawks (N. C.), Burwell, 3 Denio, 61; Johnson v. 358; Wells v. Miller, 66 N. Y. 255. Harvey, 84 N. Y. 363.

<sup>2</sup> Johnson v. Harvey, 84 N. Y. 363; <sup>4</sup> Titcomb v. McAllister, 81 Me. 399. Bradley v. Burwell, 3 Denio, 61; <sup>5</sup> Houck v. Graham, 106 Ind. 195; Ramskill v. Edwards, 31 Ch. Div. Knopf v. Morel, 111 id. 570; Nurre v. Chittenden, 56 id. 462; Dawson v. 100; Aikin v. Peay, 5 Strobb. (S. C.) Petway, 4 Dev. & Batt. 396.

15; Conover v. Hill, 76 Ill. 342; <sup>6</sup> Hamilton v. Johnson, 82 Ill. 39; Stephens v. Meek, 6 Lea (Tenn.), 266; Keith v. Goodwin, 31 Vt. 268; Long- In re Blumen, 13 Fed. Rep. 623. ley v. Griggs, 10 Pick. 121.

*Contra*, Waters v. Riley, 2 H. & G. (Md.) 305.

tion of principal to the second surety, and is responsible to him for whatever he is compelled to pay, and has in no event any claim against him for contribution.<sup>1</sup>

An agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties by which one agrees to indemnify the other from loss does not contradict the terms nor vary the legal effect of the written obligation; and it may be proved by parol evidence. Such promise, although not in writing, is a bar to an action by the party making it against his co-surety for contribution.<sup>2</sup> In *Longley v. Griggs*<sup>3</sup> the plaintiff, as surety, was one of the makers of a note and paid it; the defendant was a guarantor by indorsement on its back before it was delivered to the payee. The note was given in payment of a similar note made by the same parties and indorsed by the defendant as surety. It was contended that he was liable to contribution because he indorsed the old note as surety, and the same relationship continued after the new note was given. It was held, however, that he did not continue in the same relation to the note. He made a new engagement, and had a right to do so; he did it by filling up the indorsement with the engagement of a guarantor merely.

One who becomes surety in the course of legal proceedings against the principal has no right of contribution against the original surety for the debt; but, on the contrary, the [594] latter is entitled to be subrogated to the creditor's right against such later surety, as in the case of bail, bonds for prison bounds, on appeal or injunction.<sup>4</sup>

A judgment having been recovered against one surety, and an execution levied on his property, he executed a forthcoming bond with another of the sureties against whom no judgment had then been obtained as his surety. After the bond was forfeited it was ruled that the surety in the forthcoming

<sup>1</sup> *Cutter v. Emery*, 37 N. H. 567; *Byers v. McClanahan*, 6 G. & J. 250; *Harris v. Warner*, 13 Wend. 400; *Thompson v. Sanders*, 4 Dev. & Batt. 404; *Carter v. Black*, id. 425; *Hayden v. Thrasher*, 18 Fla. 795.

<sup>2</sup> *Barry v. Ransom*, 12 N. Y. 462.

<sup>3</sup> 10 Pick. 121.

<sup>4</sup> *Briggs v. Hinton*, 14 Lea (Tenn.). 233; *Rosenbaum v. Goodman*, 78 Va. 121; *Chaffin v. Campbell*, 4 Sneed, 184; *Mitchell v. De Witt*, 25 Tex. 180 (supplement); *Osborne v. Cunningham*, 4 Dev. & Batt. 423; *Hartwell v. Smith*, 15 Ohio St. 200; *Brandenburg v. Flynn*, 12 B. Mon. 397.



bond, having paid the debt, was entitled to contribution from the other sureties in the original obligation. It was held also to be a general rule that if one surety is insolvent his share shall be apportioned among the solvent sureties; but the surety in the forthcoming bond having, by executing it, released the property of the principal in the bond, and that principal having become insolvent, his surety was not entitled to recover from the other sureties in the original bond any part of the share of his principal in the forthcoming bond as one of the sureties in the original; and held further, that the surety in the forthcoming bond was not entitled to a decree for the costs of awarding the execution on that bond either against the principal in the original or his sureties, but only against the principal in the forthcoming bond.<sup>1</sup>

W., a deputy of L., sheriff, gave a bond to his principal with five sureties for the faithful discharge of his duties; L. not being satisfied with this security, W. and three other persons as his sureties gave a second bond to L., with like condition, a memorandum being indorsed on this second bond at the time of its execution, in conformity with a previous agreement, that L. should not resort to the second bond for indemnity for the misconduct of the deputy so long as the sureties in the first bond should be residents of the state, and it should appear that he could be indemnified without recourse to the sureties in the second bond. L. recovered judgment on the [595] first bond against the sureties therein bound for the amount of damages sustained by him by reason of the deputy's misconduct in office; held, that the sureties in the first bond had no right to contribution from the sureties in the second.<sup>2</sup>

There is an exception in cases of tort<sup>3</sup> to the rule that defendants standing *equali jure* are bound to contribute. But it is not universally true that there is no contribution between trespassers or wrong-doers. If one of several parties who have engaged in an act which, when done, appears to them right and lawful, but which turns out to be an injury to some third party, pays the damages which such third party may

<sup>1</sup> Preston v. Preston, 4 Gratt. 88; v. Bing, 3 Ohio, 33; Hartwell v. Dunlap v. Foster, 7 Ala. 734; Ham-Smith, 15 Ohio St. 200.

mock v. Baker, 3 Bush, 208; Smith <sup>2</sup> Harrison v. Lane, 5 Leigh, 414.

<sup>3</sup> Dent v. King, 1 Ga. 200.

recover on account of the injury so done, he may maintain a suit for contribution; and all parties to the transaction may be compelled to pay their just proportions respectively of the sums so paid. As decided in *Adamson v. Jarvis*<sup>1</sup> the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the party seeking redress must be presumed to have known that he was doing wrong. When the parties think they are doing a legal and proper act contribution will be compelled; but when they are conscious that they are doing a wrong the courts will not interfere.<sup>2</sup>

To produce equality and give sureties a reciprocal right of contribution, the legal character and effect of their undertakings should be in substance the same; they should be bound to the performance of the same duty, or the payment of the same debt, and in favor of the same party. When this is the case they are co-sureties whether they all sign the same instrument, or sign different instruments, at the same or different times.<sup>3</sup> The guardian of a minor who had given a guardianship bond in the form required by law was subsequently required, in view of a late increase of the estate, to give a new bond [596] in a larger penal sum than the first; such bond was accordingly filed with a new surety. It was held that both bonds were valid, and the sureties in them co-sureties; that, being bound in different sums, they were, as between themselves, compellable to contribute in proportion to the different penalties in their respective bonds.<sup>4</sup>

<sup>1</sup> 4 Bing. 66.

<sup>2</sup> *Achison v. Miller*, 2 Ohio St. 203. The distinction stated in the text is not always borne in mind. *Block v. Estes*, 92 Mo. 318.

<sup>3</sup> *Somers v. Johnson*, 57 Vt. 274; *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177; *Stevens v. Tucker*, 87 Ind. 109; *Young v. Shunk*, 30 Minn. 503; *Perrins v. Ragland*, 5 Leigh, 552; *Whiting v. Burke*, L. R. 6 Ch. 342; affirming L. R. 10 Eq. Cas. 529; *Kellar v. Williams*, 10 Bush, 216; *Deering v. Earl of Winchelsea*, 2 B. & P. 270; *Woodworth v. Bowes*, 5 Ind. 276; *Breckenridge v. Taylor*, 5 Dana, 110;

*Bosley v. Taylor*, id. 157; *Craig v. Ankeney*, 4 Gill, 225; *Norton v. Coons*, 3 Denio, 130; *Warner v. Morrison*, 3 Allen, 566; *Stout v. Vanse*, 1 Rob. (Va.) 169; *Bentley v. Harris*, 2 Gratt. 357; *Harris v. Ferguson*, 2 Bailey L. 397; *Cobb v. Haynes*, 8 B. Mon. 137; *Bell v. Jasper*, 2 Ired. Eq. 597; *Bright v. Lennon*, 83 N. C. 183.

<sup>4</sup> *Loring v. Bacon*, 3 Cush. 465; *Armitage v. Pulver*, 37 N. Y. 494; *Stevens v. Tucker*, 87 Ind. 109; *Cobb v. Haynes*, 8 B. Mon. 137; *Pickens v. Miller*, 83 N. C. 543; *Bell's Adm'r v. Jasper*, 2 Ired. Eq. 597; *Bentley v. Harris' Adm'r*, 2 Gratt. (Va.) 358 (ad-

Where several principals become bound for the same debt they stand in the relation of co-sureties.<sup>1</sup> Where a debt is contracted by several persons for a common purpose, and one of them pays the whole of it, he may sue each of the others separately at law for his aliquot share thereof.<sup>2</sup> Six persons drew a bill of exchange upon which money was received by them; at the same time they executed an instrument in which they recited that the bill was drawn for the mutual benefit of all the parties to it, and that each would bear an equal proportion in its payment, each paying his separate portion. It was held that each was surety for the others for all above his own share in the bill; that they were co-sureties for all above the sum they were individually liable for.<sup>3</sup>

Indorsements upon negotiable paper for the accommodation of the drawer import not a joint, but a several and successive liability, each indorser being responsible to all who succeed him.<sup>4</sup>

**§ 756. Basis of contribution.** Co-sureties are always supposed to assume the same risk, and to stand relatively to the principal in the same situation; neither obtaining any benefit by the transaction, and each equally subjecting himself to responsibility.<sup>5</sup> Where one surety, without the knowledge of his co-surety, by previous arrangement with the principal debtor, received one-half of the sum borrowed, he was denied [597] contribution from the other surety who undertook the responsibility in confidence that his associate was equally with him exposed to risk.<sup>6</sup>

If a surety is entitled to contribution his right of recovery, and the amount to which he is entitled from his co-sureties, are based on and governed by the maxim that "equality is

ditional injunction bond); *Kenter v. Thompson*, 13 Bush, 287 (additional official bond).

<sup>1</sup> *Chipman v. Morrill*, 20 Cal. 130; *Hetfield v. Dow*, 27 N. J. L. 440; *Crafts v. Mott*, 4 N. Y. 603; *Hayes v. Morrison*, 38 N. H. 90.

<sup>2</sup> *Parker v. Ellis*, 2 Sandf. 223.

<sup>3</sup> *Martin v. Baldwin*, 7 Ala. 923.

<sup>4</sup> *Bank of U. S. v. Biérne*, 1 Gratt. 239; *McCarty v. Roots*, 21 How. (U. S.)

432; *Spence v. Barclay*, 8 Ala. 581; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Sherrod v. Rhodes*, 5 Ala. 683; *McDonald v. Magruder*, 3 Pet. 470. But see *Daniel v. McRae*, 2 Hawks, 590; *Richards v. Simms*, 1 Dev. & Bat. 48; *Currier v. Fellows*, 27 N. H. 366.

<sup>5</sup> *McPherson v. Talbott*, 10 Gill & J. 499.

<sup>6</sup> *Id.*

equity." Where all are solvent, each is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties.<sup>1</sup> If one of several has paid the entire debt, or more than his share of it, each of the others is severally liable for his proportion, to which interest may be added.<sup>2</sup> If, after each surety has contributed his share of the debt, to one of them is refunded the amount paid by him, he is answerable to the others for a ratable share of it.<sup>3</sup> And where one has been obliged to pay costs to the creditor, he may recover from his co-surety the same proportion of them as of the debt paid.<sup>4</sup> The failure to pay the debt which occasioned the costs is to be imputed to all who were liable, and sued; and the extent of their neglect is to be measured by the respective proportions which they were bound to pay in reference to each other at the time of the suit brought. They were bound to contribute each his proper share towards the debt; and the costs which resulted from their neglect to pay it must be apportioned among them in proportion to the measure of neglect imputable to them. The same equitable principles which govern among co-promisors in reference to the debt for which they are jointly liable apply in case of costs recovered in a judgment against them jointly for non-payment of their joint debt.<sup>5</sup> So a surety may recover in a suit against a co-surety a proportionate share of the taxable costs which he was compelled to pay in the suit against himself, for each is equally in fault for not paying the debt;<sup>6</sup> and also for costs and expenses of de- [598]

<sup>1</sup>Gross v. Davis, 87 Tenn. 226; though the co-surety was not served  
Rodgers v. McClure, 4 Gratt. 81; with process. Van Winkle v. Johnson, 11 Ore. 469. But he cannot recover attorneys' fees stipulated for in a note unless he has paid them to the holder. Acers v. Curtis, 68 Texas, 3 Pet. 470.

<sup>2</sup>Acers v. Curtis, 68 Texas, 423; 432. But see Carpenter v. Minter, 72 Miles v. Bacon, 4 J. J. Marsh. 463; id. 370.

Gibbs v. Bryant, 1 Pick. 118; Gross  
v. Davis, 87 Tenn. 226; Curtis v. Banker, 136 Mass. 355.

<sup>3</sup>Smith v. Hicks, 5 Wend. 48. See Gould v. Fuller, 18 Me. 364.

<sup>4</sup>Hayes v. Morrison, 38 N. H. 90; Knight v. Hughes, 3 C. & P. 467; Bos-  
Davis v. Emerson, 17 Me. 64. Al- ley v. Taylor, 5 Dana, 157; McKenna

<sup>5</sup>Hayes v. Morrison, 38 N. H. 90.

<sup>6</sup>Wynn v. Brooke, 5 Rawle, 106; Kemp v. Finden, 13 M. & W. 421; Briggs v. Boyd, 37 Vt. 534; Gross v. Davis, 87 Tenn. 226. See *contra*,



fending a suit if the defense is reasonably and judiciously made.<sup>1</sup> Where one of the sureties paid the debt, and took the assignment of a mortgage by which it was in part secured, he was allowed against his co-surety a commission of five per cent. on the value of the premises, and the expenses of foreclosure and sale.<sup>2</sup> But it has been held in New Hampshire that unless there is some agreement, there is no right to contribution in respect to other expenses than the costs collected in a suit against a surety. In the absence of any agreement to that effect either of the parties incurring expense in defending the suit does so on his own account. The fact that others have a common interest with him in the defense will not of itself authorize him to incur expense upon their joint account.<sup>3</sup>

§ 757. **Insolvency of co-surety.** In equity an insolvent surety is ignored in the apportionment of the debt among the sureties; so that if one has paid the debt and sues for contribution, the amount which the insolvent should pay must be shared and borne by the others, as though such insolvent had never been bound.<sup>4</sup> But at law in some states this equity has not yet been adopted, and the amount is ascertained which each co-surety should contribute without regard to the insolvency of any one or more of the sureties.<sup>5</sup> In other states this principle of equity is in force at law.<sup>6</sup> A surety who has removed from the state is considered insolvent.<sup>7</sup> On the ques-

v. George, 2 Rich. Eq. 15. Contribution was decreed as to traveling expenses in Preston v. Campbell, 3 Hayw. (Tenn.) 20.

<sup>1</sup> Gross v. Davis, 87 Tenn. 226; Curtis v. Banker, 136 Mass. 355; Fletcher v. Jackson, 23 Vt. 581; Marsh v. Harrington, 18 Vt. 150. See Comegys v. State Bank, 6 Ind. 357; Walker v. Hatton, 10 M. & W. 249; Greely v. Dow, 2 Met. 176; Penley v. Watts, 7 M. & W. 601.

<sup>2</sup> Livingston v. Van Rensselaer, 6 Wend. 63.

<sup>3</sup> Hayes v. Morrison, 38 N. H. 90.

<sup>4</sup> Gross v. Davis, 87 Tenn. 226; Riley v. Rhea, 5 Lea (Tenn.), 116;

McKenna v. George, 2 Rich. Eq. 15; Rynearson v. Turner, 52 Mich. 7; Stewart v. Goulden, id. 143; Samuel v. Zachery, 4 Ired. 377; Parker v. Ellis, 2 Sandf. 223.

<sup>5</sup> Riley v. Rhea, Samuel v. Zachery, *supra*; Cobb v. Haynes, 8 B. Mon. 137; Dodd v. Winn, 27 Mo. 501.

<sup>6</sup> Gross v. Davis, 87 Tenn. 423; Liddell v. Wiswell, 59 Vt. 365; Mills v. Hyde, 19 Vt. 59; Currier v. Baker, 51 N. H. 613; Bosley v. Taylor, 5 Dana, 147; Harris v. Ferguson, 2 Bailey, 397; Strong v. Mitchell, 19 Vt. 644; Magruder v. Admire, 4 Mo. App. 133.

<sup>7</sup> Liddell v. Wiswell, 59 Vt. 365; Boardman v. Paige, 11 N. H. 431.

tion of contribution between co-sureties, partners who signed in the partnership name are to be regarded as but one surety.<sup>1</sup>

§ 758. **Indemnification of surety by principal.** It is no objection to an action for contribution that the plaintiff has received a partial indemnity from the principal by an assignment of property; the assignment inures to the benefit [599] of all the sureties, and the defendant is liable for his proportion of the balance paid by the plaintiff beyond the indemnity.<sup>2</sup> Where a surety had a deed of trust of certain property as an indemnity executed by the principal, and the surety neglected to have it registered, and the property was sold by other creditors, it was held that he lost his right to contribution.<sup>3</sup> To the extent that such security would save the sureties from loss, neglect of the surety in preserving, or his voluntary act in relinquishing, it will detract from his right to contribution.<sup>4</sup> And the presumption is that the securities surrendered are of the value expressed upon their face, and the burden of showing that they were not rests upon the party surrendering them.<sup>5</sup> A surety may take securities from his principal to indemnify himself; and if he brings an action against his co-surety for contribution the fact of his having such securities will not bar a recovery; but after such recovery the defendant is entitled to enforce his right of subrogation, and so obtain the benefit of the securities. If before action brought for contribution securities held for indemnity are converted into money, it is a payment *pro tanto* to the surety by the original debtor, and so far an extinguishment of the liability. A co-surety sued for contribution may show that money has been so realized.<sup>6</sup> Whatever advantage or benefit results to one surety from his dealings as such with the common debtor or

<sup>1</sup> Chaffee v. Jones, 19 Pick. 260.

24 Ala. 285; Schmidt v. Coulter, 6

<sup>2</sup> Boughner v. Hall, 24 W. Va. 249;

Minn. 492.

Bachelor v. Fiske, 17 Mass. 463; John v. Jones, 16 Ala. 454.

<sup>5</sup> Paulin v. Kaighn, 29 N. J. L. 480; Fielding v. Waterhouse, 40 N. Y. Super. Ct. 424.

<sup>3</sup> Pool v. Williams, 8 Ired. 286.

Super. Ct. 424.

<sup>4</sup> Taylor v. Morrison, 26 Ala. 728; Teeter v. Pierce, 11 B. Mon. 399; Ramsey v. Lewis, 30 Barb. 403; Roberts v. Sayre, 6 T. B. Mon. 188; Currier v. Fellows, 27 N. H. 366; Goodloe v. Clay, 6 B. Mon. 236; Chilton v. Chapman, 13 Mo. 470; Steele v. Mealing,

<sup>6</sup> Roberts v. Jeffries, 80 Mo. 115; Wolcott v. Hagerman, 50 N. J. L. 289; Keiser v. Beam, 117 Ind. 31; Tolle v. Boeckeler, 12 Mo. App. 54; Whitman v. Harriman, 85 Ind. 49; Shaeffer v. Clendenin, 100 Pa. St. 565; Boughner v. Hall, 24 W. Va.

creditor inures to the benefit of his co-obligors.<sup>1</sup> Hence a surety who has paid a judgment and pursuant thereto has obtained a sale of his principal's property, and become the purchaser of it at a nominal price, may be charged in the adjustment of his claim against his co-surety with its fair value;<sup>2</sup> and if a surety who has received funds from his principal makes a profit on them, this will lessen the amount he may recover from a co-surety.<sup>3</sup> There are, however, some limitations upon this right. If indemnity is furnished one surety by a stranger to the contract the co-sureties have no claim thereto.<sup>4</sup> A surety who is fully indemnified cannot claim contribution.<sup>5</sup> It has also been held that it is not inequitable, under some circumstances, for a debtor to make specific pledges of his own property, limited to the personal indemnity of a single surety, without the benefit of participation or subrogation, as when the surety's liability is contingent upon conditions not common to his co-sureties, and which may never become absolute.<sup>6</sup> The right of a co-surety to claim the benefit of security given to his fellow is subject to the superior claim of the creditor to the benefit of all securities given by the principal debtor to a surety for the payment of the debt. The creditor's right does not rest upon any liability of the debtor to him, or upon any peculiar relation growing out of the suretyship, but upon the principle that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor.<sup>7</sup> This prin-

249; *Simmons v. Camp*, 71 Ga. 54;

*Scribner v. Adams*, 73 Me. 541; *McMahon v. Fawcett*, 2 Rand. (Va.) 514;

*Paulin v. Kaighn*, 29 N. J. L. 480; *Anthony v. Percifull*, 8 Ark. 494. See

*Smith v. Steele*, 25 Vt. 427; *White v. Banks*, 21 Ala. 705. Compare *Morrison v. Taylor*, 21 Ala. 779; *Goodloe v. Clay*, 6 B. Mon. 236; *Ramsey v. Lewis*, 30 Barb. 403.

<sup>1</sup> *Owen v. McGehee*, 61 Ala. 440; *Simmons v. Camp*, 71 Ga. 54.

<sup>2</sup> *Sanders v. Weelburg*, 107 Ind. 266.

<sup>3</sup> *Simmons v. Camp*, 71 Ga. 54.

<sup>4</sup> *Leggett v. McClelland*, 39 Ohio St. 624.

<sup>5</sup> *Reinhart v. Johnson*, 62 Iowa, 155.

<sup>6</sup> Per *Matthews, J.*, in *Hampton v. Phipps*, 108 U. S. 260, 265, referring to *Hopewell v. Cumberland Bank*, 10 Leigh (Va.), 206. See *Moore v. Moore*, 4 Hawks (N. C.), 358.

<sup>7</sup> Per *Gray, J.*, in *Keller v. Ashford*, 133 U. S. 610, 623. See *Tolle v. Boeckeler*, 12 Mo. App. 54.

ciple applies where the security is given for mere indemnity,<sup>1</sup> and the creditor's right is not barred though the statute has run on the note indemnified against nor because the mortgage has been foreclosed by one to whom it has been assigned.<sup>2</sup> But it does not extend to a security given by one surety to his co-surety to secure him against loss by reason of having assumed that relation.<sup>3</sup> According to some authorities the creditor can only reach securities held by the surety as indemnity by way of subrogation after he has actually or constructively been damnified.<sup>4</sup> But the weight of authority is to the effect that an assignment of securities by the principal to his surety for that purpose raises an implied trust in favor of the creditor, which, on the maturity of his debt, he may enforce, whether the surety has been damnified or not, and whether the latter or his principal, either or both, are insolvent.<sup>5</sup>

### § 759. Accrual of right of action; voluntary payment.

No suit against a co-surety for contribution can be maintained unless the plaintiff has paid more than his share of the debt.<sup>6</sup> Parke, B., said: "This appears to us to be very reasonable; for if a surety pays part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety who might [600] himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-security would

<sup>1</sup> Keene Five Cents Savings Bank v. Herrick, 62 N. H. 174.

<sup>2</sup> Holt v. Penacook Savings Bank, 62 N. H. 557.

<sup>3</sup> Hampton v. Phipps, 108 U. S. 260. See Bowditch v. Green, 3 Met. 360.

<sup>4</sup> Rankin v. Wilson, 47 Iowa, 463; Carpenter v. Bowen, 42 Miss. 28; Pool v. Doster, 57 id. 258; Hopewell v. Cumberland Bank, 10 Leigh (Va.), 206.

<sup>5</sup> Per Powers, J., in Morrill v. Morrill, 53 Vt. 74, citing New Bedford Inst. v. Bank, 9 Allen, 175; Kramer's Appeal, 37 Pa. St. 71; Rice's Appeal, 79 id. 168; Seibert v. True, 8 Kan. 52; Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866; Moore v. Moberly, 7 B.

Mon. 299; Curtis v. Tyler, 9 Paige, 432; Ten Eyck v. Holmes, 3 Sandf. Ch. 428; Parris v. Hulett, 26 Vt. 308; Brandt. Suretys. & Guar., § 283; 1 Story's Eq. Jur., § 499. To the same effect is Kelly v. Herrick, 131 Mass. 373.

<sup>6</sup> Ex parte Gifford, 6 Ves. 805; Smith v. State, 46 Md. 617; Fletcher v. Grover, 11 N. H. 368; Camp v. Bostwick, 20 Ohio St. 337; Morgan v. Smith, 70 N. Y. 537; Roberts v. Jeffries, 80 Mo. 115; Glasscock v. Hamilton, 62 Texas, 143; Gross v. Davis, 87 Tenn. 226; Gourdin v. Trenholm, 25 S. C. 362; Hampton v. Phipps, 108 U. S. 260; Pegram v. Riley, 88 Ala. 399.



have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until he has paid more than his proportion, either of the whole debt, or that part of the debt which remains unpaid of the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that he has no equity to receive a contribution, and consequently no right of action which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, has paid a portion of the debt, and the principal, within six years, has paid the residue, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the surety has paid more than his share. . . . The right of action having been once established, it seems clear that when a surety has paid more than his share every such payment ought to be reimbursed by those who have not paid theirs in order to place him on the same footing.<sup>1</sup> If he satisfies a debt or discharges a liability at a discount, he can only claim contribution on the basis of the amount he actually pays.<sup>2</sup> But if the entire debt is satisfied the right to contribution exists though the payment made was less in amount than the surety would have been liable for if the full amount of the claim had been collected.<sup>3</sup>

One of two sureties of an insolvent administrator bought up legacies for which the sureties were bound at a discount, and it was held that he could only charge his co-surety for his proportion of what was paid for the legacies and of the expense of purchasing them.<sup>4</sup> And if the payment is made in

<sup>1</sup> *Davies v. Humphreys*, 6 M. & W. 153.

<sup>2</sup> *Sinclair v. Redington*, 56 N. H. 146. See *Comegys v. State Bank*, 6 Ind. 357.

<sup>3</sup> *Stallworth v. Preslar*, 34 Ala. 507.

<sup>4</sup> *Tarr v. Ravenscroft*, 12 Gratt. 642.

In *New Bedford Inst. v. Hathaway*, 134 Mass. 69, the holder of a note, by arrangement with a solvent surety thereon, proved it against the insolvent estate of another surety, and assigned his note and his claim

against such estate to the solvent surety, who paid him in full. It was held in equity that the surety could prove only one-half the claim against the estate of his co-surety, although he would not receive more than one-half of what he had paid if he was allowed to prove to the full amount. But see *Hess' Estate*, 69 Pa. St. 272; *Ex parte Stokes*, De Gex, 618. The last case is inconsistent with *Keith v. Forbes*, 3 Paton, 350; *Ex parte Elton*, 3 Ves. 238.

property or in depreciated currency doubtless the same rule should apply between co-sureties as between surety and principal.<sup>1</sup> Nor can a surety claim contribution until he has actually made payment; and what is payment between surety and principal is such between surety and surety.<sup>2</sup> If payment of more than is due is made a co-surety is not bound for the excess.<sup>3</sup> If the debt is due any surety may pay it voluntarily, and hold his co-sureties for their respective portions; but if the principal is solvent contribution cannot be enforced.<sup>4</sup> A surety released by the creditor with the consent of his [601] co-surety is not liable for contribution.<sup>5</sup> If a surety discharge one of his co-sureties such discharge is equivalent only to payment of his share.<sup>6</sup> A surety who voluntarily pays money on a void note or obligation is not entitled to contribution.<sup>7</sup> So one of two sureties who pays a judgment obtained against himself, on a cause of action which was barred as to the other or himself at the date of the judgment, cannot claim contribution.<sup>8</sup> But if a suit be brought against one of two sureties on a note before the statute of limitations could be successfully interposed as a defense by either, and judgment is obtained after the time when the statute would have furnished a defense in a suit then commenced, and this judgment is satisfied, the right to contribution is not barred.<sup>9</sup> The legal rights of sureties as against each other are not governed by the *lex loci contractus*; hence if, after an action against them is barred by the law of the state in which all the parties to the debt are resident, one of the sureties voluntarily, but in

<sup>1</sup> See *ante*, §§ 748, 750; *Edmunds v. Shehan*, 47 Tex. 443; *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh. 558.

<sup>2</sup> *Ante*, §§ 747, 748; *Chandler v. Brainard*, 14 Pick. 285; *Atkinson v. Stewart*, 2 B. Mon. 348; *Pinkston v. Talliaferro*, 9 Ala. 547; *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, *id.* 307; *White v. Carlton*, 52 Ind. 371.

<sup>3</sup> *Briggs v. Hinton*, 14 Lea (Tenn.), 233.

<sup>4</sup> *Glasscock v. Hamilton*, 62 Texas, 143.

<sup>5</sup> *Bouchaud v. Dias*, 3 Denio, 238.

<sup>6</sup> *Currier v. Baker*, 51 N. H. 613; *Hoyt v. Tuthill*, 33 Hun, 196.

<sup>7</sup> *Russell v. Failor*, 1 Ohio St. 327; *Glasscock v. Hamilton*, 62 Texas, 143, 153.

<sup>8</sup> *Glasscock v. Hamilton*, 62 Texas, 143, 153; *Cochran v. Walker's Ex'rs*, 82 Ky. 220; *Cocke v. Hoffman*, 5 Lea (Tenn.), 105; *Shelton v. Farmer*, 9 Bush, 314.

<sup>9</sup> *Glasscock v. Hamilton*, 62 Texas, 143, 153; *Cutter v. Emery*, 37 N. H. 567; *Boardman v. Paige*, 11 *id.* 427.

good faith, goes into another state where there is no defense to the demand, and judgment is there rendered against him, he may compel his co-surety to contribute.<sup>1</sup> If the estate of a deceased surety is discharged from liability to a creditor on account of the debt not being presented within the period allowed by law for that purpose it is still liable to contribution in favor of a surety who afterwards pays the debt.<sup>2</sup> A surety is not bound to defeat a suit on his contract because of an alteration in it. As to co-sureties who signed it after it was changed he may enforce contribution. They were liable to the payee, and the waiver of their co-surety's rights did not injure them. He is also liable for his proportion.<sup>3</sup> The right of action by the surety for contribution does not accrue at the breach of the contract with the creditor, but upon his payment of the money.<sup>4</sup> The common law, which has adopted the equitable principle of contribution by allowing an action upon an implied *assumpsit*, confines the remedy to those cases in which there is a just and equitable ground for contribution. It has been denied where the surety who seeks contribution is indebted to the principal for more than he has paid,<sup>6</sup> or has been otherwise reimbursed.<sup>7</sup>

§ 760. **Conclusiveness of judgment.** If a surety has no notice of a suit against a co-surety he is not bound by the judgment therein.<sup>8</sup> But a joint judgment against the sureties is [602] conclusive as between themselves that a cause of action exists against them.<sup>9</sup> A judgment against one is also conclusive against another if he is notified and has an opportunity to defend.<sup>10</sup> And where a judgment has been recovered against a

<sup>1</sup> Aldrich v. Aldrich, 56 Vt. 324.

<sup>2</sup> Camp v. Bostwick, 20 Ohio St. 337.

<sup>3</sup> Houck v. Graham, 106 Ind. 195.

<sup>4</sup> Reeves v. Pulliam, 9 Baxter (Tenn.), 153; Wood v. Leland, 1 Met. 387; Evans v. Evans, 16 Ala. 465.

<sup>6</sup> Russell v. Failor, 1 Ohio St. 327; McCrary v. Parks, 18 Ohio St. 1.

<sup>6</sup> Bezzell v. White, 13 Ala. 422. But see O'Brien v. Karing, 57 N. Y. 649.

<sup>7</sup> Mason v. Lord, 20 Pick. 447.

<sup>8</sup> Annett v. Terry, 35 N. Y. 256;

Briggs v. Boyd, 37 Vt. 534; Thomas v. Hubbell, 35 N. Y. 120.

If a suit against all but one of several sureties is compromised by a judgment for a less sum than the principal is liable for, a co-surety not sued and not included in the compromise is not bound to contribute to the reimbursement of the others.

Glasscock v. Hamilton, 62 Texas, 143.

<sup>9</sup> Knopf v. Morel, 111 Ind. 570; Waller v. Campbell, 25 Ala. 544.

<sup>10</sup> Love v. Gibson, 2 Fla. 598.

part of the sureties, and they have paid it, it is competent evidence of the amount they were obliged to pay though not of their liability.<sup>1</sup>

## SECTION 3.

## EXPRESS INDEMNITIES.

§ 761. **Damage the gist of the action.** An agreement to indemnify against or save harmless from damages is not broken unless there has been actual loss or injury from the cause against which the indemnity is given.<sup>2</sup> In such cases damages are the gist of the action, and no cause of action arises until there is a breach resulting in actual injury.<sup>3</sup> The agreement for indemnity, however, may be so drawn that though intended exclusively as such, it will admit of a technical breach before there is cause for recovery of substantial damages; in other words, before the event occurs against which the agreement is intended to protect. Such would be a note given as indemnity, but payable before a cause of action for indemnity had accrued. A suit could be maintained, but only nominal damages could be recovered; for the true consideration and purpose of the note would be open [603] to proof.<sup>4</sup> If, however, actual damages are sustained at any time before the trial, they may be proved and the recovery increased accordingly.<sup>5</sup> A covenant against incumbrances is

<sup>1</sup> Glasscock v. Hamilton, 62 Texas, 143, 151; Preslar v. Stallworth, 37 Ala. 402; Leake v. Covington, 99 N. C. 559; Fletcher v. Jackson, 23 Vt. 581.

<sup>2</sup> Oaks v. Scheifferly, 74 Cal. 478; Little v. Ragan, 83 Ky. 314; Selover v. Harpending, 18 Abb. New Cas. 252; Simonson v. Grant, 36 Minn. 439; Staats v. Herbert, 4 Del. Ch. 508; Churchill v. Hunt, 3 Denio, 326; Aberdeen v. Blackmar, 6 Hill, 324; Coe v. Rankin, 5 McLean, 354; Wicker v. Hopkock, 6 Wall. 94; Little v. Little, 13 Pick. 426; Crippen v. Thompson, 6 Barb. 532; Conner v. Bean, 43 N. H. 202; Lott v. Mitchell, 32 Cal. 23; Gardner v. Cleveland, 9 Pick.

336; Hall v. Creswell, 12 Gill & J. 38; Lyman v. Lull, 4 N. H. 495; Jeffers v. Johnson, 21 N. J. L. 73; Chace v. Hinman, 8 Wend. 452; Weller v. Eames, 15 Minn. 461; Gennings v. Norton, 35 Me. 308; Churchill v. Moore, 15 Kan. 255; Ewing v. Reilly, 34 Mo. 113; Douglass v. Clark, 14 Johns. 177; Hussey v. Collins, 30 Me. 190; Scott v. Tyler, 14 Barb. 202; Abeles v. Cohen, 8 Kan. 180; Jones v. Childs, 8 Nev. 121. See Conkey v. Hopkins, 17 Johns. 113.

<sup>3</sup> Id.

<sup>4</sup> Boynton v. Twitty, 53 Ga. 214.

<sup>5</sup> Haseltine v. Guild, 11 N. H. 390; Osgood v. Osgood, 39 id. 209; Anthony v. Percifull, 8 Ark. 494; Boynton



another instance of such an agreement for indemnity of which there may be a technical breach giving a right to recover nominal damages before actual injury.<sup>1</sup>

In all cases of conditions or covenants to indemnify and save harmless from damages, the proper plea is *non damnificatus*, and then the maintenance of the action depends on the proof of damages.<sup>2</sup> But it is otherwise where the condition or agreement is to discharge or acquit the plaintiff from some particular thing; for there the defendant must set forth affirmatively the special manner of performance.<sup>3</sup>

The authorities are by no means uniform in the construction of agreements of similar nature and words, in determining whether they shall be deemed to be contracts of indemnity merely, or agreements against the existence of a certain condition, or requiring some positive act of performance. If the contract deviates the least from a simple one to indemnify against damages, even though indemnity is the sole object of it, and where actual loss may be sustained in consequence of a breach, it is generally treated as belonging to the latter [604] class, and damages are recovered accordingly.<sup>4</sup> Where the undertaking is simply to indemnify against damages, and a cause of action exists, the measure of damages is the actual

ton v. Twitty, 53 Ga. 214; Day v. Stickney, 14 Allen, 255; Witherby v. Mann, 11 Johns. 518; Cornwall v. Gould, 4 Pick. 444; Douglass v. Moody, 9 Mass. 548; Child v. Eureka Powder Works, 44 N. H. 354.

<sup>1</sup> Willson v. Willson, 25 N. H. 229; Brooks v. Moody, 20 Pick. 474; Van Slyck v. Kimball, 8 Johns. 198; Stannard v. Eldridge, 16 id. 254.

<sup>2</sup> 1 Saund. 117, note 1; Hulland v. Malken, 2 Wils. 126; Cox v. Joseph, 5 T. R. 307; Archer v. Archer, 8 Gratt. 539; Holmes v. Rhodes, 1 Bos. & P. 640 and note; Harmony v. Bingham, 12 N. Y. 113; Thomas v. Allen, 1 Hill, 146.

<sup>3</sup> Id.; Cro. Eliz. 94; Port v. Jackson, 17 Johns. 239; Andrus v. Waring, 20 id. 153; Coombs v. Newton, 4 Blackf. 120; McClure v. Erwin, 3

Cow. 332; Woods v. Rowan, 5 Johns. 42.

<sup>4</sup> Conner v. Bean, 43 N. H. 202; In re Negus, 7 Wend. 502; Gilbert v. Wiman, 1 N. Y. 553; Hall v. Nash, 10 Mich. 303; Churchill v. Moore, 15 Kan. 255; Dye v. Mann, 10 Mich. 291; Jarvis v. Sewall, 40 Barb. 449; Webb v. Pond, 19 Wend. 423; Jones v. Child, 8 Nev. 121; Lewis v. Crockett, 3 Bibb, 196; Rawson v. Copland, 2 Sandf. Ch. 254; Willett v. Stewart, 43 Barb. 98; Churchill v. Hunt, 3 Denio, 326; Jeffers v. Johnson, 21 N. J. L. 73; McDonald v. Bauskett, 10 Rich. 178; Weller v. Eames, 15 Minn. 461; Stroh v. Kimmel, 8 Watts, 157; Penny v. Foy, 8 B. & C. 11; Warwick v. Richardson, 10 M. & W. 284; Pond v. Warner, 2 Vt. 532; Morrison v. Berkey, 7 S. & R. 238.

injury of the kind indemnified against; where the undertaking is to acquit and discharge the promisee, or that some act or event shall or shall not transpire, the damages will be ascertained with reference to the benefit or immunity the promisee would have received if the contract had been performed.<sup>1</sup> In the former case the principle is adhered to that compensation will be limited to actual injury; but in the latter not only will such compensation be given, but in many cases it will be allowed for probable injury.<sup>2</sup> Some of the cases in which damages for such probable injury are allowed will hereafter be referred to.

§ 762. **What may be recovered.** The damages allowable on express agreements for indemnity will depend on the scope of the undertaking; they can only be such as naturally and proximately proceed from the cause referred to in it.<sup>3</sup> When the indemnity is general against the costs and expenses of a certain act, or "against all actions, suits, costs, damages and demands whatsoever for or by reason or on account thereof," it extends to the costs of defending a groundless suit for the act, in which the indemnified party succeeded;<sup>4</sup> and so where the obligation is "for the payment of such sum as may from any cause be adjudged against the plaintiff."<sup>5</sup> The words "all costs whatsoever" to which the officer "may be liable," and all the costs which he may be "obliged by law to pay any person or persons," include counsel fees reasonably incurred.<sup>6</sup> Under an agreement to indemnify for any loss that may be sustained by reason of becoming surety on a recognizance, there may be a recovery of the cost of taking judgment.<sup>7</sup> But where the indemnity is against damages which may be sustained by an attachment if it proves to be unlawful, in the absence of wilful wrong or oppression, a successful claimant of the attached property cannot recover the sum expended for attorneys' fees or for his personal expenses or loss of time.<sup>8</sup> The damages recoverable must be of the nature contemplated

<sup>1</sup> Wicker v. Hoppock, 6 Wall. 94.

<sup>2</sup> Gilbert v. Wiman, 1 N. Y. 552.

<sup>3</sup> Hallock v. Belcher, 42 Barb. 199.

<sup>4</sup> Trustees of Newburgh v. Galatian, 4 Cow. 340; Chamberlain v. Beller, 18 N. Y. 115; Chilson v. Downer, 27 Vt. 536.

<sup>5</sup> Jordan v. La Vine, 15 Ore. 329;

Carlton v. Dixon, 14 id. 294.

<sup>6</sup> Lindsey v. Parker, 142 Mass. 582.

<sup>7</sup> Keesling v. Frazier, 119 Ind. 185.

<sup>8</sup> Brinker v. Leinkauff, 64 Miss. 236.

by the agreement, as well as the proximate consequence of the cause stated. A plaintiff in a writ of attachment, desiring to attach goods which had been put on board a vessel, gave a bond to her owner conditioned to pay "all expenses, damages and charges which might be incurred by the owner or master of the schooner, or to which they might be subjected, for unloading said goods from said vessel, and for all necessary detention of said vessel for said purpose." It was held that the obligee was not entitled to recover upon the bond, in addition to the expenses, damages and charges directly and immediately incurred by him in unloading the merchandise from the schooner, compensation for legal expenses to which he was subjected in defending a suit commenced against the schooner by the consignee of the goods in another state.<sup>1</sup> A bond given by an administrator to save his sureties "from any loss or error which might arise from or be caused by said administration" does not make him liable for expenses incurred by them in an effort to secure their discharge, or to compel the obligor to account.<sup>2</sup> Under a stipulation assuming all liability for and indemnifying the obligor's employer against "any damages arising from injuries sustained by mechanics, laborers or other persons by reason of accidents or otherwise," there is no duty to respond for the negligence of the obligee's employees.<sup>3</sup> The sureties on an indemnity bond preliminary to the issue of an attachment are not liable for the sheriff's wilful conversion of the goods without their knowledge or consent.<sup>4</sup>

An agreement to keep harmless and pay all damages in case of levying on and selling certain property on an execution was held to apply, though the property was replevied before sale; the officer was entitled to recover the costs, attorney fees, and expenses of defending the replevin suit, as well as the damages adjudged therein, although the principal obligor alone had notice of the commencement and pendency of such suit.<sup>5</sup> It was considered that the bond was intended to indemnify the officer for taking and holding, and also for selling the

<sup>1</sup> *Hallock v. Belcher*, 42 Barb. 199.

<sup>4</sup> *Dawson v. Baum*, 3 Wash. T'y,

<sup>2</sup> *Boyle v. Boyle*, 106 N. Y. 654. 464.

<sup>3</sup> *Manhattan Ry. Co. v. Cornell*, 54

<sup>5</sup> *Finckle v. Evan*, 25 Ohio St. 82.

*Hun*, 292.

property. It was deemed proper also to allow the costs and expenses of defending the suit, because, as the court say, "the obligors had notice of the suit, and had agreed that it should be defended." And they add, "clearly this entitled the constable, if he chose to do so, to defend the suit and recover from the obligors his costs, attorney fees and expenses. Nothing less than this would be an indemnity, according to the terms of the bond, and notice to one of the joint obligors was sufficient."<sup>1</sup> In a late English case it appeared that the assignee of a lease undertook to indemnify the assignor against breaches of the covenants and conditions under which the latter held the premises. No assignment was executed, but the indemnifying party entered and held possession until the agreement expired; he let the premises fall out of repair, and the assignor was sued by his landlord for such dilapidations. After the assignee had notice of the action the assignor paid money into court, which the jury found to be sufficient. It was held in an action brought by him against his assignee on his promise of indemnity that the plaintiff was entitled to recover as damages the extra costs necessarily incurred by him over and above the taxed costs paid to him in defending the former action.<sup>2</sup>

An interesting case on this point occurred in Maine, [606] and appears to have been decided on thorough consideration. It was an action of debt on a bond conditioned "to fully indemnify and save harmless" the plaintiff "from all loss, damage and harm whatsoever by reason of a suit for the infringement of any patent in selling paper collars which the plaintiff has had or may hereafter have" of the defendants, and "to pay all fair and reasonable charges for expenses in defending said suit." The case is thus stated by the court: "In 1867 the plaintiff, a dealer in gentlemen's clothing, was the agent of the defendants in Maine for the sale of paper collars; the Union Paper Collar Company commenced a suit against the plaintiff for an alleged infringement of their patent in the sale of these collars, and on December 17, 1867, attached upon their writ in that suit the plaintiff's entire stock of goods, of

<sup>1</sup> *Finckle v. Evan*, 25 Ohio St. 82. (Exch.) 33; S. C., L. R. 6 Exch. 43;

<sup>2</sup> *Howard v. Lovegrove*, 40 L. J. 23 L. T. (N. S.) 396; 19 W. R. 188.



the value of \$2,750; the plaintiff immediately notified the defendants of the attachment and used his best efforts to procure the release of his stock from the attachment; but he was unable to do so until January 6, 1868, when he succeeded in procuring receptors only by mortgaging the stock to secure them; the plaintiff incurred reasonable and necessary expenses in two visits to the defendants in New York, the last time with counsel, resulting in the giving of the bond in suit; the plaintiff contracted a severe illness on his return from New York, in consequence of which his store remained closed until the 1st of February, 1868; his business credit, which was previously good, was destroyed by the attachment; he has been obliged to retain the greater part of the goods mortgaged to secure his receptors, and the goods have depreciated twenty-five per cent.; he lost the profits of his store during the time that it remained closed, and they have been greatly diminished since on account of the reduction of the stock caused by the attachment and mortgage, and the consequent loss of credit. The suit of the Union Paper Collar Company against the plaintiff is still pending and undecided, and the plaintiff has actually paid nothing as yet on account of it, except as above stated, though he has become liable for counsel fees to a considerable amount." The court held the plaintiff entitled to recover damages, first, for the depreciation of his stock of goods while necessarily withheld from sale by the attachment made on the writ in the suit for infringement of the patent; second, for the reasonable debt contracted, though not paid, for the services of counsel in defending the suit; and third, for the reasonable expenses of himself and counsel incurred in relieving his stock from the attachment. And it was held that no damages were recoverable, first, for loss of probable profits during the time the plaintiff's stock was under the control of the attaching officer; second, the loss of probable net profits while the store remained closed in consequence of the plaintiff's illness, contracted while trying to relieve the stock from the attachment; third, for the diminution of profits consequent upon the reduction of the stock; fourth, for the prospective damages arising from the loss of mercantile credit caused by the attachment; and fifth,

for the expenses of the plaintiff and his counsel in procuring the defendants to enter into the bond in suit.<sup>1</sup>

§ 763. **Same subject.** If the indemnified party, for [608] the cause indemnified against, suffers judgment and makes a

<sup>1</sup> *Ripley v. Mosely*, 57 Me. 76. Burrows, J., said: "The language of the bond is general and comprehensive, and the plaintiff is entitled to recover all damages which he can legally be deemed to have suffered by reason of the suit, together with the expenses incurred in defending it, so far as they are found 'fair and reasonable;' these last being expressly provided for. We think that under the latter clause in the condition, the debt contracted by the plaintiff to counsel for services in defending the suit against him, *though not yet paid*, is a proper subject for allowance in making up the damages. The course pursued was undoubtedly contemplated by both parties. The defendants do not appear to have employed any counsel to defend the suit; and they bound themselves to pay 'all just and reasonable charges for the expenses in defending.' Ripley was to be saved harmless, not only from any judgment that the Union Paper Collar Co. might recover against him for damages and costs, but also from expense in defending the suit. He has not been saved harmless in the matter of these expenses, but has been forced to incur an indebtedness which the defendants should have provided means to discharge. . . . *Lyman v. Lull*, 4 N. H. 495. . . . Nor do we think it can be maintained that the depreciation of the plaintiff's stock, while it has been necessarily withheld from sale on account of the attachment, is not a legitimate subject of damages recoverable here. The attachment of the stock was a natural and common incident of the suit. The plaintiff did his best to

procure its release, but was unable to effect it on any terms which permitted him to make sale of the goods. This depreciation is a matter capable of being definitely ascertained. The loss is neither speculative nor dependent upon contingencies, and is one of the natural and direct results of the suit. The plaintiff's stock has been taken from him. In the natural course of things, it is diminished in value by the lapse of time. It is a loss to him as much as if a portion of it were sold. And we are of opinion that the reasonable expense of himself and counsel, incurred by the plaintiff in the effort to release his property from attachment, is also recoverable; but not that which was incurred for the purpose of procuring the defendants to enter into the contract of indemnity.

"And with regard to all the other items which go to make up the damages assessed, we think them either too remote and uncertain, or too much complicated with other intervening efficient causes to be allowed in this suit. They do not seem to us to be either the direct and natural consequences of the suit, or to be such losses as may reasonably be supposed to have been in the contemplation of both parties at the time the agreement was entered into. No small part of them accrued by reason of other efficient proximate causes, the force and effect of which cannot be estimated; nor can the damages accruing from the combination be apportioned. The object of the bond was to reimburse the plaintiff for so much property as should be taken from him by reason of the suit and

payment upon it;<sup>1</sup> if his property becomes incumbered and he pays the incumbrance;<sup>2</sup> or is subjected to service or trouble or any expense<sup>3</sup> within the scope of the agreement he may [609] recover damages for the same.<sup>4</sup> So if the party lose

for the expenses of defending it. It cannot be so extended as to relieve the plaintiff from all the consequences of his unfortunate or unwise management since, though he may have fallen into the mistakes or met with the misfortunes in consequence of the suit operating as a remote cause. But the damages thence resulting are consequences of consequences, and not legally computable. Very manifestly, if there were no other elements of uncertainty, this should prevent the allowance made for loss of probable profits during the time the store remained closed in consequence of the plaintiff's illness contracted on his return from New York; for the diminution of profits consequent upon the reduction of his stock; and for the speculative damages arising from loss of mercantile credit. Much of the reasoning in *Hayden v. Cabot*, 17 Mass. 169, is applicable in this case."

Under a bond given to obtain the right to enter upon land and lay a gas line, and conditioned to pay "all damages of whatsoever nature and kind that may be suffered or sustained," there may be a recovery for the loss of trade brought about by the enforced removal of the obligee's place of business. *Penn. Natural Gas Co. v. Cook*, 123 Pa. St. 170.

<sup>1</sup> *Valentine v. Wheeler*, 116 Mass. 478; *White v. French*, 15 Gray, 339; *Moule v. Garret*, 41 L. J. (Exch.) 62; L. R. 7 Exch. 101; *Wallace v. Gilchrist*, 24 Up. Can. C. P. 40; *Green v. Brookins*, 23 Mich. 48; *Anthony v. Percifull*, 8 Ark. 474; *Brooklyn v. Brooklyn R. Co.*, 57 Barb. 497; *Holdgate v. Clark*, 10 Wend. 216.

<sup>2</sup> *Webb v. Pond*, 19 Wend. 423; *Smith v. Compton*, 3 B. & Ad. 407.

<sup>3</sup> *Nutt v. Merrill*, 40 Me. 237; *Jarvis v. Sewall*, 40 Barb. 449; *Lyman v. Lull*, 4 N. H. 495; *French v. Parish*, 14 N. H. 497; *Smith v. Compton*, 3 B. & Ad. 407; *Fisher v. Fallows*, 5 Esp. 171; *Mott v. Hicks*, 1 Cow. 513; *Short v. Kalloway*, 11 A. & E. 28; *Orr v. Bigelow*, 20 Barb. 21; *Trustees of Newburgh v. Galatian*, 4 Cow. 340; *Hayden v. Hill*, 52 Vt. 259; *Milk v. Waite*, 18 Abb. New Cas. 236 (expense of arresting absconded defendant).

<sup>4</sup> In *Scott v. Tyler*, 14 Barb. 202, the bond sued on recited that an execution had been placed in the hands of the obligee, the plaintiff. As sheriff, and by virtue of it, his deputy had levied on certain goods and chattels claimed by one Disbrow, who was not the execution debtor, and who had replevied the same from the plaintiff, and that action was pending. The condition was that in case the plaintiff should defend that suit, then if the obligors should indemnify and save harmless the obligee from "all costs, charges and expenses which he shall incur in defending," the obligation to be void. It was held to be the intention of the parties to limit the obligation to the expenses of the defense, strictly, and that the damages and costs recovered by Disbrow were not embraced. The plaintiff incurred costs and expenses which he had assumed to pay, but had not paid, amounting to \$112.25. These were also disallowed because they had not been paid. *Strong, J.*, said: "If the obligation of the defendants is to indemnify and

property by breach of the agreement to indemnify,<sup>1</sup> he will be entitled, among other damages, to recover its value.

The extent of recovery upon an express indemnity is not affected by the fact that other parties than the indemnitor shared the benefits of the act indemnified against. Thus, a sheriff was put to expense and costs, covered by a bond of indemnity, in a successful defense of an action brought against him by a claimant of goods attached; and it was held that he was entitled to recover the whole amount upon the bond, and not merely a proportional part, though other creditors who did not indemnify him received the surplus proceeds after satisfying the indemnifying creditor.<sup>2</sup> The terms "damages, costs and expenses," in a covenant of indemnity against the payment of a demand, do not cover a premium or bonus which the party is compelled to pay to raise the amount of the demand.<sup>3</sup> Where indemnitors are brought in as parties by the sheriff in an action against him for levying writs of attachment upon property not owned by the defendant named therein, they will be deemed to be before the court only for the purpose of enabling the sheriff to enforce his rights against them; in such action their liability cannot exceed the penalty of their bond.<sup>4</sup> If there are several writs and bonds and the sheriff is charged as for a conversion in a sum exceeding the gross amount of the penalties in all the bonds the obligors in each will be charged to the extent of the penalties in their respective bonds.<sup>5</sup> The liability of the indemnitors of a sheriff who wrongfully seizes property under an attachment when he held another bond at the time of the levy and subsequently

save the plaintiff harmless from *charge* or *liability*, he is entitled to recover to the extent of the charges of his attorneys, his liability therefor being established; but, if it is to indemnify and save harmless from loss or expenses, he must fail, no loss or expense within the terms of the bond being proved." This decision on this point covers debatable ground; and there is an irreconcilable conflict in the cases relating to it. It is believed that there is a preponderance of authority against the above ruling, not

only in cases of indemnity, but other cases where expenses constitute an item of damages.

<sup>1</sup> Sanders v. Hamilton, Mart. & Hayw. 458; Ackerman v. King, 29 Tex. 291; Crump v. Picklin, 1 Pat. & Heath (Va.), 201.

<sup>2</sup> Chamberlain v. Beller, 18 N. Y. 115.

<sup>3</sup> Low v. Archer, 12 N. Y. 277.

<sup>4</sup> Leshner v. Getman, 30 Minn. 321; Stevens v. Wolf, 77 Texas, 215.

<sup>5</sup> Leshner v. Getman, 30 Minn. 321.



received other bonds in other actions is not limited to the proportion which their bond bore to the whole amount of the bonds held by him. The attachment debtor may regard the creditors in the proceeding as joint trespassers, and proceed against one, several or all of them for his whole damages.<sup>1</sup> But such liability does not extend to cases in which creditors act independently of each other, and in which valid liens have been obtained equal in amount to the value of the property, and judgments pursuant thereto have been recovered. In such a case the indemnitor's liability is limited to the residue of the property which was not subject to the prior seizures.<sup>2</sup> If property conveyed in trust to indemnify a surety is wrongfully sold his damages are not measured by the net proceeds of the sale and interest thereon, but by its market value at the time his right to have it sold accrued.<sup>3</sup>

**§ 764. Contribution or indemnity between wrong-doers.**

[610] Though it is a well-settled principle that there is no contribution or indemnity between wrong-doers, this principle does not apply where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of the law;<sup>4</sup> or where the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person.<sup>5</sup> A promise to indemnify another for committing a wilful and wicked trespass is not binding; but a contract to save harmless one who, from good motives, did an act for his employer which, contrary to his expectation, happened to be an injury to a third person, will be enforced; and any amount which may be recovered by the injured party from such employer he may recover on the indemnity.<sup>6</sup>

**§ 765. Contracts varying from indemnity, but intended as such.** Contracts are often made, the general purpose of

<sup>1</sup> Posthoff v. Bauendahl, 43 Hun, 570. See Lovejoy v. Murray, 3 Wall. 1.

<sup>2</sup> Posthoff v. Schreiber, 47 Hun, 593.

<sup>3</sup> Bush v. Haeussler, 31 Mo. App. 47; Woolner v. Spalding, 65 Miss. 204.

<sup>4</sup> Spalding v. Oakes, 42 Vt. 343.

<sup>5</sup> Ives v. Jones, 3 Ired. 538; Miller v. Rhoades, 20 Ohio St. 494; Stone v. Hooker, 9 Cow. 154; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; Hamden v. New Haven, etc. Co., 27 Conn. 158.

<sup>6</sup> Id.

which is indemnity, but which are not merely to save harmless or to indemnify against damages, but provide against the cause of damage; they are contracts for the prevention of damage. Of this nature are contracts to indemnify against the bringing of actions, or the existence of debts or liabilities, or the occurrence of particular facts from which injury is apprehended. Such contracts may relate to existing actions, debts and liabilities, and require their discontinuance or discharge, or to the preservation of the rights of the indemnified party, and be intended to indemnify or save him harmless by restraining acts which would impair or destroy such rights. It is held in England and in the upper Canadian province that where the undertaking is to save harmless, or protect against all actions or debts which the promisee may become liable to pay, the consequence follows that where judgment has been obtained against him in such action, or upon any such debt or liability, he is entitled to recover the whole amount of the judgment against the covenantor, although he may not himself have paid the debt or any part of it.<sup>1</sup> [611] But the rule supported by the greater number of cases in our courts, and which most accords with the sound principle of allowing compensation only for actual loss, as well as limiting the damages to the extent of the breach of contract, is that where the contract is to save harmless from actions, debts, costs and expenses, it is a mere indemnity against damages; and there is no cause of action until damages are suffered, and then the recovery is limited to them.<sup>2</sup> It has been held, however, in some American cases, that a covenant to save harmless from all suits is broken by the commencement of a suit;<sup>3</sup> that when a covenant is made to indemnify against a

<sup>1</sup>Smith v. Teer, 21 Up. Can. Q. B. 412; Spence v. Hector, 24 id. 277; Loosmore v. Radford, 9 M. & W. 657; Warwick v. Richardson, 10 id. 284; Carr v. Roberts, 5 B. & Ad. 78; Smith v. Howell, 6 Exch. 739.

<sup>2</sup>Aberdeen v. Blackmar, 6 Hill, 324; Crippin v. Thompson, 6 Barb. 532; Lott v. Mitchell, 32 Cal. 23; Donely v. Rockefeller, 4 Cow. 253; Hussey v. Collins, 30 Me. 190; Coe v. Rankin, 5 McLean, 354; Conner v.

Bean, 43 N. H. 202; Douglass v. Clark, 14 Johns. 177; Churchill v. Moore, 15 Kan. 255; Jeffers v. Johnson, 21 N. J. L. 73; McDonald v. Bauskett, 10 Rich. 178; Selover v. Harpending, 54 N. Y. Super. Ct. 251; Sinsheimer v. Tobias, 53 id. 508; Trinity Church v. Higgins, 48 N. Y. 537; National Bank v. Bigler, 83 id. 51, 61.

<sup>3</sup>Wilson's Adm'r v. Bowens, 2 T. B. Mon. 86.

debt or duty which may accrue in the future, a liability to suit is a breach, and recovery may be had to the extent of the debt or duty to which the indemnity applies,<sup>1</sup> or as ascertained by a judgment, though no part of it has been paid nor any actual injury suffered.<sup>2</sup>

Where the contract is more than for indemnity against damages, as where a party stipulates against the doing of certain acts, or the existence of certain conditions, or for payment or performance of any kind, then damages are not the gist of the action, and the value of performance will measure the amount recoverable for the breach. Thus, for example, a contract to pay a debt or to discharge a liability then existing, no time being specified, is a promise to pay it when [612] due, forthwith or within a reasonable time, if already due.<sup>3</sup> The promisee on breach of such contract is entitled to recover the amount of the debt and interest, though he has not paid it or any part of it, if it is a debt the discharge of which would be beneficial to him.<sup>4</sup> The measure of damages

<sup>1</sup> *Robertson v. Morgan's Adm'r*, 3 B. Mon. 307; *Chace v. Hinman*, 8 Wend. 452; *Rockefeller v. Donnelly*, 8 Cow. 623.

<sup>2</sup> *Carman v. Noble*, 9 Pa. St. 366; *Fish v. Dana*, 10 Mass. 46; *Webb v. Pond*, 19 Wend. 423; *Gilbert v. Wiman*, 1 N. Y. 550; *Jones v. Childs*, 8 Nev. 121; *In re Negus*, 7 Wend. 499; *Kirksey v. Friend*, 48 Ala. 276; *Conkey v. Hopkins*, 17 Johns. 113; *Jarvis v. Sewall*, 40 Barb. 449; *Banfield v. Marks*, 56 Cal. 185; *McBeth v. McIntyre*, 57 id. 48; *Martin v. Roltenbaugh*, 42 Ohio St. 508; *Conner v. Reeves*, 103 N. Y. 527.

<sup>3</sup> *Campbell v. Baker*, 46 Pa. St. 243; *Roberts v. Riddle*, 79 id. 468; *Furnas v. Durgin*, 119 Mass. 500; *Lathrop v. Atwood*, 21 Conn. 117; *Wilson v. Stillwell*, 9 Ohio St. 468; *Gilbert v. Wiman*, 1 N. Y. 550.

<sup>4</sup> *Id.*; *Banfield v. Marks*, 56 Cal. 185; *Trinity Church v. Higgins*, 48 N. Y. 532; *Belloni v. Freeborn*, 63 id. 383; *Stout v. Folger*, 34 Iowa, 71;

*Jeffers v. Johnson*, 21 N. J. L. 73; *Dayton v. Gunnison*, 9 Pa. St. 347; *Wilson v. Stillwell*, 9 Ohio St. 468; *Kettle v. Lipe*, 6 Barb. 467; *Raymond v. Cooper*, 8 Up. Can. C. P. 388; *Braman v. Dowse*, 12 Cush. 227; *Churchill v. Hunt*, 3 Denio, 321; *Nutt v. Merrill*, 40 Me. 237; *Dye v. Mann*, 10 Mich. 291; *Hall v. Nash*, id. 303; *Dorsey v. Dashiell*, 1 Md. 198; *Conkey v. Hopkins*, 17 Johns. 113; *Kip v. Brigham*, 7 id. 168; *Sprague v. Seymour*, 15 id. 474; *Fish v. Dana*, 10 Mass. 46; *Gilbert v. Wiman*, 1 N. Y. 550; *Thomas v. Allen*, 1 Hill, 146; *Lathrop v. Atwood*, 21 Conn. 117; *Ketcham v. Jauncey*, 23 id. 123; *Merriam v. Pine City L. Co.*, 23 Minn. 314; *Gage v. Lewis*, 68 Ill. 604.

In *Gilbert v. Wiman*, 1 N. Y. 550, *Pratt, J.*, said: "Perhaps there is no branch of law concerning which the decisions of our courts have been more fluctuating than in relation to damages, especially in relation to the damages arising upon contracts in

on the breach of an undertaking to discharge the duties of a surviving partner is the amount which would have been received if there had been a faithful performance.<sup>1</sup> A promise to pay a debt due a third person is not restricted in any way by a further promise to indemnify such person and save him harmless.<sup>2</sup>

§ 766. **Same subject.** The amount of the debt agreed [613] to be paid is not the measure of damages if the promisee is

the nature of contracts of indemnity. According to strict legal principles, a court of law, it would seem, should only give actual compensation for actual loss; and such is the rule in relation to contracts of indemnity against damages merely. *Aberdeen v. Blackmar*, 6 Hill, 324; *Jackson v. Post*, 17 Johns. 432. . . . But in personal contracts, when the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is the sole object of the contract, and where in consequence of the primary liability of other persons actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined towards fixing the rule to be one of actual compensation for probable loss; so that in contracts of that character it may now be considered a general rule, both in this country and in England. *Thomas v. Allen*, 1 Hill, 146; *Holmes v. Rhodes*, 1 B. & P. 638; *Hodgson v. Bell*, 7 T. R. 97; *Post v. Jackson*, 17 Johns. 239. For instance, in an action on a covenant that a bond or other debt upon which a covenantee is liable shall be paid when due, or on a day certain, it has been long settled that the plaintiff may recover the full amount of his liability, although it is evident from the terms of the contract that it was intended merely as an indemnity, and although the parties primarily

liable are abundantly able to pay. *Mann v. Eckford's Ex'rs*, 15 Wend. 502; *Ex parte Negus*, 7 id. 499; 7 T. R. 97; 2 M. R. 181. Indeed, the late supreme court have gone so far in some recent cases as to allow a full recovery when it did not appear that the plaintiff was liable at all, or could be injured by a breach of the contract; the court deciding that they had a right to infer that the plaintiff had some interest in having the debt discharged, or he would not have made the contract. *Thomas v. Allen*, 1 Hill, 146; *Tyler v. Ives*, MS. Sup. Court, 1839. That the plaintiff had some interest in such a case would be probable; but that he had an interest to the full amount of the original indebtedness, in the absence of proof, seems to be rather a violent presumption; such, however, is the effect of these decisions. In the last case cited above, *Ives* covenanted with *Tyler* that *Raynor* should pay up and discharge a bond and mortgage upon certain lands. There was no evidence to show that *Tyler* had any interest in the lands, or in the discharge of the bond and mortgage, or was in any manner liable upon the same; yet the court held that he was entitled to recover the full amount of the bond."

<sup>1</sup> *Miller v. Kingsbury*, 28 Ill. App. 532; affirmed, 128 Ill. 45.

<sup>2</sup> *Locke v. Homer*, 131 Mass. 93, 109; *Shattuck v. Adams*, 136 id. 34.



not liable for the debt assumed and cannot gain by its payment, nor be prejudiced by its non-payment. Where a party owning land which is subject to a mortgage for the payment of which he is not personally bound sells and conveys it subject to the mortgage which the grantee engages to pay, this agreement is construed as a mere declaration that the property was conveyed to him subject to the lien of the mortgage thereon, and that the general covenants of seizin and warranty in the conveyance are not intended to extend to this particular incumbrance, of which the grantee assumed the payment in case he should wish to retain the title of the land conveyed to him.<sup>1</sup> Such a grantor, to whom the promise to pay such a mortgage is made, having no effect on its payment beyond the effect of such payment on the covenants for title, the agreement is construed to accomplish what such facts indicate was the intention of the parties; and is restricted to secure the promisee just the benefit which would accrue to him from the payment agreed to be made — exemption as to that debt from liability on those covenants. If, however, the grantor of lands burdened with an incumbrance is personally liable for the debt so secured and the grantee agrees to pay it, then an actual discharge of that debt is necessary to the grantor's indemnity; and the agreement to pay it will be construed to extend his exoneration. In the former case the failure of the grantee to pay the mortgage would be no actual injury to the grantor; but in the latter case it would; and he is allowed to recover damages measured by the amount of the debt. In that case the [614] mortgagor may by subrogation in equity also enforce the obligation in his own favor.<sup>2</sup>

The recovery of damages to the amount of the debt by the promisee who has not paid it, but is only liable for it, or has a beneficial interest in having it paid, has sometimes been referred to as compensation allowed for only probable injury. It is not such in any just sense. Such agreements must have a consideration; the promisor, in contemplation of law, has received such value that it is a just and legal duty he has assumed to pay the debt, and the benefit of its cancelment by

<sup>1</sup> Halsey v. Reed, 9 Paige, 446; *supra*; Blyer v. Monholland, 2 Sandf. Trotter v. Hughes, 12 N. Y. 74. Ch. 478; Rawson's Adm'r v. Cop-

<sup>2</sup> Trotter v. Hughes, Halsey v. Reed, land, id. 251.

payment to the promisee will equal its amount; and by necessary consequence, its non-payment is a legal detriment and injury to the same amount.

The sale of land subject to a mortgage for which the seller is liable and which the buyer agrees to pay is an apt illustration. An owner of land sells it; he owes a debt which is secured on the land. If he gets the full value of the land he can pay off the debt and discharge the incumbrance at once. He is then exonerated from that debt; his creditor has his dues, and the purchaser has only paid for the land. On the other hand, if the seller leaves so much of the purchase-money in the hands of the buyer as is equal to the incumbrance, on such buyer's agreement to pay the debt, so long as the buyer retains the money after the debt is due, he retains money equal in amount due for the land and which he had agreed with the seller to pay for his benefit. In the same sense, whenever one undertakes by an original agreement to pay another's debt, the latter suffers the injury at once when a default in making the payment occurs. The damages are to be estimated not exceptionally, but on the general principle of allowing the injured party compensation equal to the benefit he would derive from performance. It has been suggested that in such a case the promisee may never be compelled to pay the debt; that is not the proper test of injury to him. After such a contract he has a right to have his debt paid; and to be morally and legally exonerated by payment; not merely to be indemnified in a perpetual delinquency to his creditor. Trover will [615] lie by a maker for conversion of his note which he has paid, or one tortiously diverted from the use for which it was made.<sup>1</sup> In such a case it is equally true that the maker may never be called on to pay; but that consideration does not prevent a recovery for the face of the note where the maker is exposed to injury to that amount.

Courts of law are not adapted like courts of equity to do complete justice to all parties interested in such cases; that is, to protect the defaulting party by requiring the money so

<sup>1</sup> Decker v. Mathews, 12 N. Y. 313; 98; Stone v. Clough, 41 N. H. 290; Buck v. Kent, 3 Vt. 99; Park v. McNeal v. Hanson, 60 Me. 84; Otisfield Daniels, 37 Vt. 594; Pierce v. Gilson, v. Mayberry, 63 Me. 197. 9 Vt. 216; Spencer v. Dearth, 43 Vt.

recovered to be applied to the debt, though its payment may be important to him. This, however, has been done in some cases.<sup>1</sup>

§ 767. **Effect of judgment.** "The covenantor in an action on a covenant of general indemnity against judgments is concluded by the judgment recovered against the covenantee from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the retrial of an issue which as against the covenantee had been conclusively determined in the former action, 'always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.'"<sup>2</sup> A judgment by default is covered by an indemnity against judgments.<sup>3</sup> Where it is taken by the consent of the obligee, its force as evidence against the sureties is presumptive only; they may show that it was not founded upon any legal liability or not to the extent it goes. In the absence of such evidence the amount of the judgment is the sum the obligee is entitled to recover.<sup>4</sup>

<sup>1</sup> *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140; *Wilson v. Stillwell*, 9 Ohio St. 467.

<sup>2</sup> *Conner v. Reeves*, 103 N. Y. 527, and earlier cases cited, p. 530; *Martin v. Bolenbaugh*, 42 Ohio St. 508.

<sup>3</sup> *Lee v. Clark*, 1 Hill, 56; *Aberdeen v. Blackmar*, 6 id. 324; *Annett v. Terry*, 35 N. Y. 256.

<sup>4</sup> *Conner v. Reeves*, 103 N. Y. 527; *Lindsey v. Parker*, 142 Mass. 582.

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